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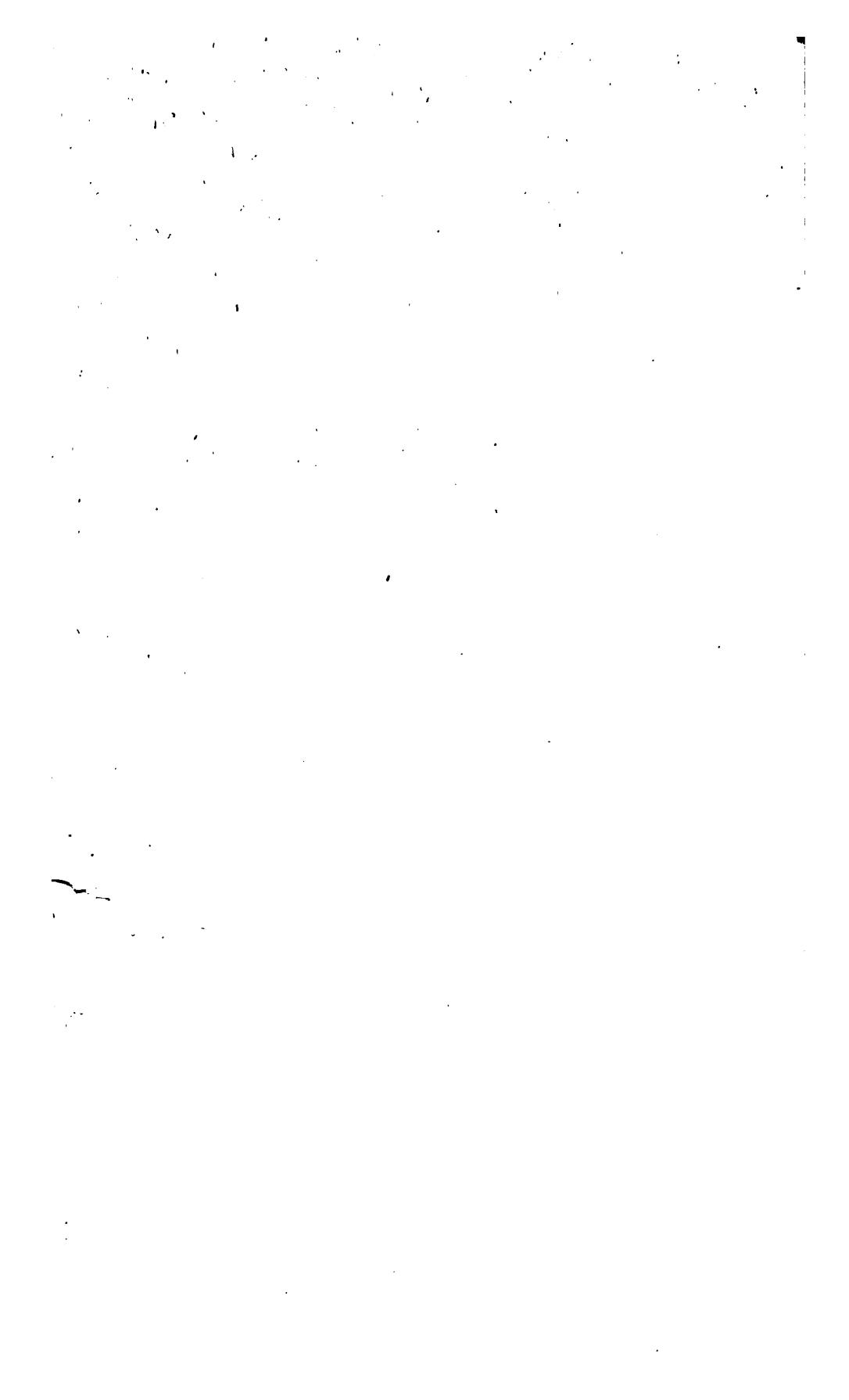


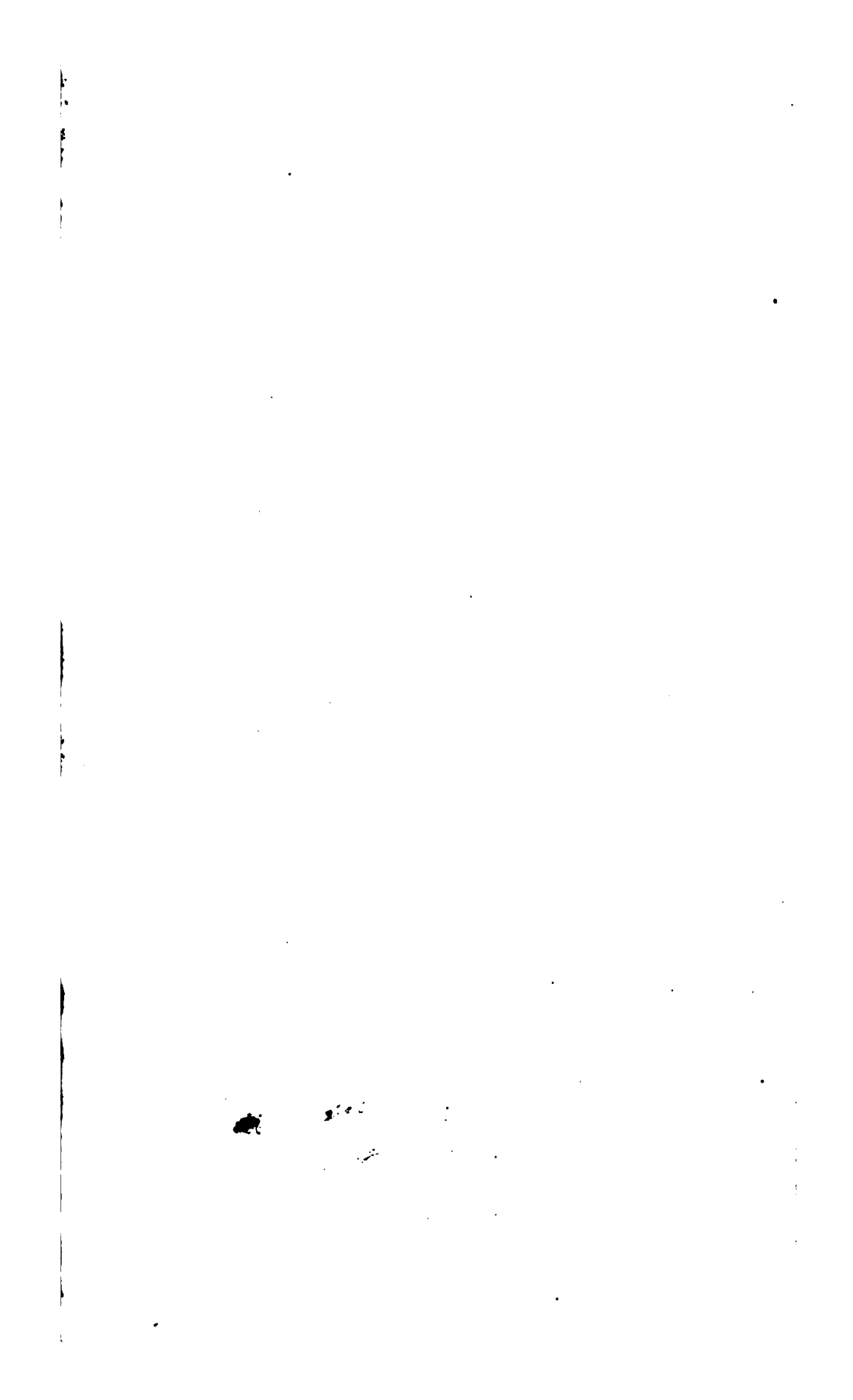




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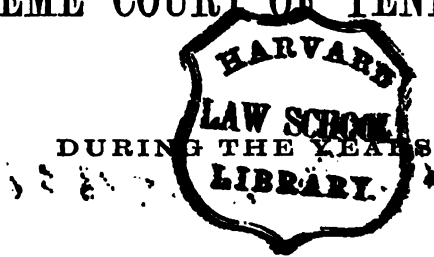
# REPORTS

OF THE

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,



1853--4.

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BY JOHN L. T. SNEED,  
STATE REPORTER.

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VOLUME I.

NASHVILLE:  
M'KENNIE & BROWN, PRINTERS—TRUE WHIG OFFICE.  
1855.

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CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF TENNESSEE,  
FOR THE  
EASTERN DIVISION,

---

KNOXVILLE: SEPTEMBER TERM, 1853.

---

BLAIR AND GILLENWATER, *adms. vs.* DAVID SNODGRASS AND  
JACOB LYON, *et als.*

**WILL. REVOCATION.** *Executory Contract; sale of land by, previously devised.* Where a testator by executory contract, sells land which he had previously devised by will; in the view of a court of equity, such sale operates as a revocation of the will *pro tanto*, provided the contract of sale, be such as the court can in view of well settled principles, specifically execute. *Donahoo vs. Lea*, 1 Swan R., cited and approved.

**SPECIFIC PERFORMANCE.** *Breach of Contract. Remedy.* It being a higher and more perfect remedy than the damages which a court of law may award for a breach, it is a matter of course, that a court of equity will decree a specific performance of a contract for the sale of real property, in the absence of any valid objection. As when the contract is in *writing*, signed by the party to be charged, for an adequate consideration, certain in its terms, fair in all its parts, and capable of being performed.

**STATUTE OF FRAUDS.** *The Form of the Instrument.* The form of an instrument purporting to be a contract for the sale of real estate, is not material, the statute of frauds merely requiring that the contract or some *memorandum or note thereof*, shall be in writing. Nor is it essential to its validity, that the whole should be comprised in a single document. If it can be clearly and plainly defined from any writings of the party — or even from

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Blair & Gillenwater, *adm'rs. vs. David Snodgrass & Jacob Lyon, et als.*

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his correspondence it will suffice. But when several papers are relied upon, as written evidence of a contract for the sale of land — these papers must contain *intrinsic* proof that they relate to the same contract; for if the court cannot ascertain the terms of the same from the writing or from *some other writing to which it refers*, with reasonable certainty, the writing does not take the case out of the statute.

**CONTRACT. Vagueness. Parol Proof to Explain.** It is a well settled rule under the statute of frauds, that when divers writings are relied upon to elucidate a contract for the sale of land, parol proof is not admissible to connect or explain them, or to show that the several writings relate to the same transaction.

**WILL. Residuary Clause. Construction.** When the testator had already made provision for the children of his son J. S., dec'd, and by the residuary clause of the will bequeathed the fund equally to all his *heirs*, "except that G.'s children and F.'s children" (who were the children of his daughter who had been twice married,) were to have an equal part or one share with his other *heirs*, held, that by the word *heirs*, the testator meant *his children*, and that the heirs of J. S. were excluded.

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FROM SULLIVAN.

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THIS was a bill filed in the Chancery Court at Jonesborough, by the complainants as administrators "with the will annexed," of William Snodgrass, deceased, against David Snodgrass and other heirs and devisees of the said testator, and Jacob Lyon, asking a construction of said will, which is sufficiently quoted in the opinion, in reference to the interest of the "heirs of James Snodgrass," under the residuary clause thereof—and asking the construction of a certain contract in writing, which is also quoted in the opinion, whereby the testator sold to said Jacob Lyon certain tracts of land—subsequent to the execution of the will, which had been devised by the same to the "heirs of James Snodgrass, deceased;" especially in relation to the effect of said contract upon said devise. Testimony was produced before the Chancellor, to show, that part of the land sold to Lyon was the same

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Blair & Gillenwater, *adm'rs. vs. David Snodgrass & Jacob Lyon, et al.*

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devised to "James Snodgrass' heirs," and that the lines and boundaries were shown to Lyon at the time of the contract, and that the reason they were not more minutely described in the written contracts, was the want of skill in the draftsman thereof. The testator was induced, as appears in proof, to sell said land, by the request of the devisees, and upon verbal condition that they were to be reimbursed in money. It appears in proof also, that the legatees mentioned by the designation of "Joel Gillenwater's children and John Fleming's children," are the children of testator's daughter who was twice married. The bill submits multiplied questions, in reference to the proper adjustment of the rights of the heirs and devisees, which it is not important to notice; the Chancellor, (Hon. Thomas L. Williams,) among many other things not necessary to be here stated, decreed, a specific performance of the contract with Jacob Lyon, for the land devised to the "heirs of James Snodgrass," and subsequently sold to him; that the conveyance to Lyon was a revocation of the devise to the heirs of James Snodgrass; and that said heirs were not entitled to the purchase money, or to any interest under the residuary clause of said will; from which decree the "heirs of James Snodgrass appealed to this court.

NELSON, for Complainants.

1. The receipts executed by the legatees, or those representing them, for the sums therein specified as being "by bequest," having been given after the date of the will, and for the same amounts mentioned in it, operated as adempments of the legacies. 2 Story's Eq., § 1111,

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and note 2 to p. 508, 4th ed. Ward on Legacies, 16 Law Lib., 134-135. 2 Spence's Eq., J., 427-8-9.

2. If the principle—stated in 2 Story, § 1115, and Ward on Legacies, 136—is correct that the doctrine of constructive satisfaction, or ademption of legacies, does not apply to the devise of a *mere residue*, then the sums receipted for as “donations” should not be accounted for by those who thus receipted, and are entitled by the will to the residuum. But if this rule has been modified—or, if its true meaning is, that the devise of a residue is not a satisfaction of a previous legacy or a previous debt, (as may fairly be inferred from the cases cited in 2 Spence's Eq. J., 434, 455,) then the donees, being also residuary legatees, should account for the “donations” out of their shares of the residuum, so as to produce that perfect equality in the distribution of his estate, which, both by the eighth and residuary clauses in his will, and all his acts subsequent to its date, seems to have been the cardinal object of the testator.

3. The legacy to Nancy Meek, did not lapse by her death in the lifetime of the testator, because she died leaving issue, which issue was living at the death of the testator. The will is dated 11th May, 1842, and the case is within the 3d and 5th sections of the Act passed 5th Feb. 1842, Nic. Sup., 147.

4. The agreements, made by the testator after the date of his will to convey to Jacob Lyon the two plantations devised to the heirs of James Snodgrass, operated as a revocation of the devise, and they are not entitled to any part of the purchase money. 4 Kent, 6th ed., 528 to 530. *Walton vs. Walton*, 7 J. C. R., 267 to 274. 1 Jarman on Wills, 130 m., 145 m. Powell on Devises,

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19 Law Lib., 321, and 331 note. *Brydges vs. Chandos*, 2 Sumner's Vesey, 417-18 notes, 435 text, 437 note i. *Bennet vs. Tankerville*, 19 Vesey, 178, and note 2, p. 179. *Adams vs. Winne*, 7 Paige, 97. *Plowden vs. Hyde*, 9 Eng. Law and Eq. R., 243. 3 Greenl. Cruise, 106, § 58, 107, § 62, and note to p. 109, § 69. See 1 Swan's Reports, 119.

These agreements are not void for uncertainty. Parol evidence is admissible to explain them. 1 Greenl. Ev., 404, § 282, p. 409; § 286; § 287; § 288; p. 339, prop. v.; p. 340, § 287.

The lands intended to be sold were shown to the vendee, together with the deeds describing them on the day of sale; and as upon one construction the description of one of the tracts was omitted by mistake, it is not contrary to the statute of frauds or the course of a Court of Equity to let in parol proof to show which lands were intended. 2 Story's Eq., 4th ed., 94, § 770 a. Meigs' Dig., 203-4, No. 3, 544, No. 1003.

But giving the instrument the proper punctuation, and the five tracts are made which D. Snodgrass says the testator showed Lyon.

The two instruments were executed on the same day and should be construed together, and when thus construed, they show clearly enough that the intention was to sell the tract on which the old residence stood, the mill tract, the Jones tract and one half the Canole, and J. Snodgrass tract.

Under all the circumstances, the administrators with the will annexed, had the power to enter into the agreement with Lyon to convey the lands intended to be sold, and to pay compensation for the two small tracts

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which he had agreed to convey, and to which he had no title, and, having done so, the case stands upon the same footing as if a bill for specific performance had been filed by Lyon, and the contract had been admitted in the answer. No cross bill necessary, because two of the heirs are complainants and none of the heirs of testator, object.

5. The declarations of the testator, as to his intention to sell the land, and to give part of the proceeds to the heirs of James Snodgrass, were not admissible in evidence, and cannot have the effect to entitle them to the proceeds of sale. 1 Jarman on Wills 349 note, 350 m., 351 note 1., 376 note 1. Lovell on Wills, 23 Law Lib., 189. 3 Greenl. Cruise p. 122, No. 89.

Such deliberations, if admitted, would, in effect, make a new will for the testator, contrary to the statute of frauds. Ward on Leg. 16 Law. Lib. 7. *Watkins vs. Flora*, 8 Iredell's Law, 374. *Stowe vs. Davis*, 10 Iredell's Law R. 431.

Treated as promises, the will, being revocable and ineffectual until the death of the testator, was no consideration. And the fact that the heirs had, of their own accord, determined to remove to Missouri, and that the testator, at their request, sold the land and declared his intention, out of the proceeds to give them an outfit, but was prevented from doing so by his death, does not bring the case within the operation of any known rule of law, because the promise was verbal—made at the solicitation and risk of the heirs—without any consideration whatever on their part, either of detriment to themselves or benefit to the party promising—without even a removal to Missouri in the testator's lifetime—



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and was, in every sense, *nudum pactum*. 1 U. S. Eq. Dig., 24, No. 114. 3 Greenl. Cruise, 113, No. 75.

The cases in which promises were made by devisees and executors taking a beneficial interest under a will, in consequence of which the testator failed to insert a provision in, or make an alteration of his will, are cases of fraud, wholly inapplicable to a mere promise to make a will, or to do some other act in lieu of the provision contemplated by a will. If the will was revocable, the testator's verbal agreement, without consideration to make an advancement, was equally so.

6. The testator, on a division of his own money among his children, caused six hundred dollars of his own money to be loaned to Jesse J. Jones, and took Jones' note payable to the heirs of James Snodgrass. He retained the note in his own hands, never delivered it to the heirs, and collected three hundred and eighty dollars of the amount. This was not a valid gift to the heirs. It was void for the want of consideration, and because of the non-delivery of the note. See 2 Kent's Com., 6th ed., 438 to 440. In the case of *Brunson vs. Brunson*, Meigs 630, the facts on which the opinion of the court was predicated were, (See opinion p. p. 641-2) that the notes were actually delivered to the donee and suit brought upon one of them for his use in the lifetime of the donor, and that case substantially recognizes the principle that delivery is absolutely essential to the validity of a gift.

But if this proposition is erroneous, there can be no question, that as the gift was made subsequent to the date of the will, it operated as an ademption of the pecuniary legacy of five hundred dollars to the heirs of

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James Snodgrass. See authorities cited in support of proposition 1.

7. The heirs of James Snodgrass are not included in the residuary clause, and are not entitled to any part of the residue. Although the words "other heirs" in the sixth clause are used in such a manner as to show, by implication, that the testator regarded James Snodgrass' heirs as part of his heirs, yet it is manifest that this is not the sense in which the words—to be equally divided amongst *all my heirs*—are used in the residuary clause; for, the words which immediately follow—"giving to Joel Gillenwater's *children* and John Fleming's *children* an equal part, or one share with my other heirs—show, conclusively, that the testator knew the difference between his own heirs and his son's heirs, and between children and grand-children. See *Kay vs. Conner*, 8 Hum., 633, 634. *Timberlake vs. Harris*, 7 Fred. Eq., 189, and 1 U. S. Eq. Dig., 357, No. 335.

When providing for the division of his property, the testator uses the word "heirs" to signify his own children, and his intention in the residuary clause was to give what he styles "the overplush" to his own children (except Jane Fleming,) and to exclude Jane Fleming by the substitution of her children. Ward on Legacies, 16 Law Lib., 55-6. 1 U. S. Eq. Dig., 360, No. 407.

8. The words in the seventh clause—"as they have got their proportionable part of my estate already"—when taken in connection with the special provision in the last clause in favor of Joel Gillenwater's children and John Fleming's children, (i. e. the children of Jane Fleming,) show that it was the intention of the testa-

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tor to exclude Jane Fleming from any share of the residue. See cases cited in 2 U. S. Eq. Dig., 294, No. 88; 215, No. 297. 1 U. S. Eq. Dig., 358, No. 74.

The word "overplush" is sufficient to pass the residue of the testator's estate. The case cited in behalf of defendants, from 1 Swan, 431, does not sustain the proposition assumed, because in that case the codicil revoked the gift of the residue to Harriet, and her share was undisposed of by the will—that share being a residuary interest. But the devise to James Snodgrass' heirs is specific, and whenever it was revoked by the sale of the land, the proceeds of that sale fall into the residuum according to *Donohoo vs. Lea*, Swan's Reports, 122, and *Walton vs. Walton*, 7 J. C. R., and numerous other authorities before cited.

We omitted to answer the statement that James Snodgrass' heirs will be deprived of the greater part of their interest in the estate. They get nearly as much now as the others, and if the contract for the sale of the land is annulled, they will get greatly more. See Will and Master's Reports.

10. The two instruments can be connected without violation of the statute of frauds—because they bear date on the same day—relate to the same transaction—are proved by D. Snodgrass to have been executed for the same purpose, and are so treated in all the pleadings.

In 1 Greenleaf § 268, it is said—"It is not necessary that the written evidence required by the statute of frauds, *should be comprised in a single document*," &c. "It is sufficient if the contract *can be plainly made out in its terms from any writings of the party*," &c.

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In the note to 2 Greenleaf's Cruise, p. 50, top, (being vol. iv.) it is said, among other things, "All contemporaneous writings relating to the same subject matter, are admissible in evidence." 4 Greenleaf's Cruise, Title 32, ch. 3, § 3, and note.

See also *Coles vs. Trecothick*, 9 Vesey, 250, and note 9 to p. 253 a. *Allen vs. Bennet*, 3 Taunt., 375.

DEADRICK, for Complainants.

After the execution of his will, the testator sold his lands to Jacob Lyon. These lands, by the terms of the will, were devised to the heirs of James Snodgrass.

On the sale of the lands, the testator executed the two papers found in the Record at p. 84 and 85.

The first is an article of agreement signed by William Snodgrass and Jacob Lyon. The operative language is, "That said William Snodgrass has this day bargained and sold said Jacob, several tracts or parcels of land, all joining my old residence; also two tracts called the mill tracts, also the Jones' tract, and one half the Canole, and J. Snodgrass' tract," &c., dated, May 22, 1849.

The second — a paper not under seal, signed by Wm. Snodgrass, binding himself to make a title to Jacob Lyon. The operative words of which are, "Have this day bargained and sold to Jacob Lyon, a certain parcel of land, which said Wm. Snodgrass binds myself to have said land surveyed and run out, and make said Jacob Lyon a good warrantee deed," &c., dated, May 22, 1849.

By David Snodgrass it is proved, that he went with his father and Jacob Lyon to look at the lands, and

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the boundaries of the lands were shown. That witness drew the papers, and that the want of sufficient accuracy in the description, was on account of his want of skill.

The question presented upon these facts is, whether they operate as a revocation of the will as to the lands devised to the heirs of James Snodgrass.

On behalf of the complainants, we insist that they do.

1. If after the date of a will, the testator contracts for the sale of land devised, if that contract is obligatory on the testator, it operates a revocation of the will. 1 Jarman, 145, margin. 2 Am. L. Cases, 673, citing 5 J. C. R., 441. 7 J. C. R., 258. 7 Paige's R., 97. (See page four of this brief.)

2. But it is insisted that the instruments executed by Wm. Snodgrass, on the 22d of May, 1849, do not operate a revocation, because as alledged, they are void for uncertainty.

To this we answer—

1. The paper signed by Snodgrass alone, does not on its face refer to the other agreement. It is therefore not limited to any particular tract of land. Yet it is a sufficient compliance with the statute of frauds, and taken in connection with the proof of David Snodgrass sufficiently indicates the lands intended to be conveyed.

2. Construing both papers as one and the same transaction, as they really were, there is no patent ambiguity.

The difficulty is presented upon the phraseology of the agreement; "all adjoining my old residence, also two tracts called the mill tracts," &c. This language, it is insisted, upon its face excludes the farm on which the testator resided—and that parol evidence cannot be

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heard to show that it was in point of fact intended to be included.

We understand the rule to be, that if the intention of the party is sufficiently ascertained in the instrument, but the persons or things to which that intention applies are inaccurately described, that parol evidence is admissible to show to whom and to what such intention really applied. 1 Greenl., § 290, 299, 300, 285, 297. 3 Hump., 267, 272. U. S. Eq. Dig., 322, No. 367, 369. 3 Hay., 40. 2 Tenn., 49. 6 Hump., 447. See 1 Meigs' Dig., 487, citing most of the above authorities.

Thus in illustration of the rule, "certain premises were leased, including a yard, described by metes and bounds, and the question was whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show, that at the time of the lease, the cellar was in the occupation of another tenant, and therefore, that it could not have been intended by the parties, that it should pass by the lease." 1 Greenleaf, § 286.

If then a fact inconsistent with an intention to pass the cellar in the case put, is admissible to show, that although the language might import such an intention, yet no such intention existed, we submit that it is admissible in this case, to show by parol a fact, that shows the intention of the testator to pass or convey the farm on which he resided.

This view, it is submitted, is much strengthened by the provision in the agreement that Snodgrass will surrender by the first of September, all the premises, except buildings enough to save the crop on hand.

These buildings were on the home place, and the

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reservation of the out-buildings to save the crop, shows an intention to pass the whole.

Again, the word residence, means a house of abode, and lands adjoining my residence, may, or may not include the dwelling; and so the force of the expression does not exclude the idea of a sale of the home place; therefore, it is competent to prove the circumstances that surrounded the testator at the time, and in reference to which he used the words.

Purchase money due on land will not pass by a devise of the land. 2 Am. L. Cases, citing 7 Paige's R., 97.

The devise of the proceeds of land is removed by the sale of the land. 1 Eq. Dig., 389, No. 872.

M. T. HAYNES, for John and Jane Fleming.

What part of the testator's estate, does Jane Fleming take, under the *sixth*, *seventh*, and *residuary* clauses in his will?

1. In the latter part of the sixth clause, the testator directs, that six negroes be given to the heirs of James Snodgrass, out of them now on the plantation; *and the others to be equally divided among his "other heirs."*

By this clause in the will, the testator evidently meant, that after the specific legacy of six negroes to the heirs of James Snodgrass, deceased, all the balance of the negroes, remaining on the plantation, should be equally divided among his children; or as he calls them, "*heirs.*" Jane Fleming, is a child and heir, and therefore, is entitled under this clause, to an equal share with the other children, in the negroes remaining on

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the plantation, after the specific legacy to the heirs of James Snodgrass.

2. The seventh clause gives to Jane Fleming a pecuniary legacy of \$550, and these words are added, "as they have got their proportionable part of my estate already."

And the residuary clause directs that the "overplush" of the testator's estate, be equally divided among "all" his "heirs," giving Joel Gillenwater's children and John Fleming's children, an equal part or one share with his "other heirs."

Is Jane Fleming excluded from any share in the residuary clause? The intention of the testator is the great end to be aimed at in the construction of the will; but this intention is to be collected from the *words* used by the testator. Vide New Law Lib., vol. 1, No. 3, p. 243, and note *b*.

Extrinsic evidence is not admissible to alter, detract from, or add to the terms of a will. Vide 1 Jarman on Wills, marg. p. 358, note 1.

All the parts of a will are to be construed together, in relation to each other, and so as if possible, to form a consistent whole; but if several parts are absolutely *irreconcilable*, the latter must prevail. Vide 1 Jarman on Wills, p. 411, 412.

The court is bound to give effect to *every word* of a will, without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole will taken together. Vide 1 Jarman on Wills, p. 411, note 1.

An heir is not to be excluded by implication, unless that implication imparts such a strong probability, that a



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contrary intention *cannot be supposed*. Vide 1 Jarman on Wills, p. 465.

Negative words, merely, without words of exclusion, are not sufficient to exclude the title of the heir or next of kin. Vide 2 Jarman on Wills, p. 741.

Where the testator has used *technical words*, he is presumed to employ them in their legal sense, unless the context clearly indicates to the contrary. Vide 2 Williams' on Executors, p. 788, 789. Also 2 Jarman on Wills, p. 744. Also *Kay vs. Conner*, 8 Hump., p. 624.

With these principles, applied to the will of the testator in this case, we must conclude that it could not have been the intention of the testator to negative the title of the defendant, Jane Fleming, by using the words, "as they have got their proportionable part of my estate already," to a share in the *residuum* of his estate.

The first thing to be noticed, in interpreting the meaning of these words is the fact, that the pecuniary legacy of \$550, is the *smallest* of all the pecuniary legacies; and the words, "as they have got their proportionable part of my estate already," are used in immediate connection, with this small legacy to Jenny Fleming; and only show the *reason* why the testator gave his daughter Jane Fleming a smaller pecuniary legacy, than he had given any one of his "heirs." These words have no reference to the residuary clause; they are used in reference to the pecuniary legacies, and are employed to show Jane Fleming and the other heirs, why it was that this legacy was so much smaller than the others.

If they had got their proportionable part of the testator's estate *already*, it would have been inconsistent for him to have given them even the \$550 legacy.

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It was not meant that Jenny Fleming had got her proportionable part of the testator's *whole estate*, because *that was not true*; but it was true that the testator had made unequal advancements to his children, which were finally equalized by the unequal legacies in the will; and it was true that Jane Fleming had gotten that proportion of the testator's estate, which, in addition to \$550 bequeathed to her, would make her equal to the other heirs in that part of his estate, which he had *advanced* to his children. And this being true, we must conclude, that when the testator said "they have got their proportionable part of my estate already," he did not mean the *whole* of his estate, but all except the "overplush."

This construction will make the will consistent with itself.

If it had been the intention of the testator to exclude Jane Fleming from a share in the *residuum*, and to substitute her children in her stead, he would have used words of *exclusion*, to except her out of the general technical description of "heirs," in the residuary clause. He has used no words of exclusion; but so far from that he has used the very words to *include* her; for "all his heirs" as certainly include Jenny Fleming, as if she had been particularly named. She is not only included in the word *all*, but also in the word *heirs*.

But even if the words in the seventh clause are words of *exclusion*, then the words in the last clause are words of *inclusion*, and the clauses are therefore contradictory; and if they are contradictory, the *latter* must prevail, and Jane Fleming takes a share in the *resi-*

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*durum.* It could not have been the intention of the testator to substitute the children of Jane Fleming in her stead; because he has employed no words to *exclude* Jane Fleming from a share in the *residuum*. And the principle is clearly settled, that before one person can be substituted for another, the testator must not only designate the *object* of his gift, but he must use words of a negative and exclusive character, as words which raise so strong a probability, that an intention to the contrary cannot be supposed.

The doctrine of "Double portions" cannot apply to Jane Fleming, because, if she gets all we ask for her, she only gets a *single portion*. A double portion is a double gift to the same person. Vide Story's Eq. Jr. § 1100.

D. T. PATTERSON, for the heirs of James Snodgrass.

1. It is conceded that an agreement to convey land, entered into after the date of the will, if it is a valid agreement, certain in all its parts, such as a court of equity would specifically execute, will operate in equity as a revocation of the will *pro tanto*.

A court of equity will not enforce the specific execution of a contract to convey lands, when the contract to convey, rests partly in writing and partly in parol—and parol evidence cannot be resorted to in order to aid or explain the written contract. 3 Johnson's Rep., 418, 419 *Parkhurst vs. Van Courtlandt*, 1 J. C. R., 274. *Clinan vs. Cook*, 1 Sch. and Lef. R., 22. 2 Story's E. Jr., 767. 1 Hump. R., 326.

2. A court of equity will not enforce the specific

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execution of a contract to convey land, when it would be inequitable to do so, or when it would result in injustice. It is a matter of sound discretion in the court to interfere or to leave the party to his remedy at law. 2 Story's E. Jur., see 742, 750, 767, 769, and authorities cited in note.

3. The Chancellor erred in decreeing the specific execution of the contract mentioned in the instruments of writing signed by William Snodgrass, and set out at p. 84, 85, and 86, of the manuscript, on the prayer of the defendant Jacob Lyon. The purchaser should have filed a cross bill praying for that specific relief, against the heirs of James Snodgrass. 3 Daniell's Chancery Practice, 1742, 1743-4. 10 Hump. R., 238.

4. It is insisted that under the residuary clause of the last will and testament of William Snodgrass, the heirs of James Snodgrass are entitled to one distributive share of the "overplus."

It is manifest from the language of the sixth clause of said last will and testament, that the testator did not intend to discriminate between his children and his grand children.

It is true he speaks of the defendants in said sixth clause, as the heirs of James Snodgrass. But in the same clause and in regard to the same subject matter, the testator speaks of his own children as my "other heirs." Thus clearly demonstrating that the testator did not intend to discriminate among his heirs. In the 7th and last clause of said will, the testator directs the overplus of his estate after the "bequeaths," to be equally divided amongst "all of his heirs." This language is broad — and sufficiently comprehensive of itself to em-

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brace the heirs of James Snodgrass — unless it clearly appears from the will, that the testator intended to exclude them from taking any share of the overplus mentioned in said residuary clause. This has not been done by the language in the sixth clause, nor indeed in any part or clause of said will. The intention to exclude must be clear and undoubted; the language of the testator must be explicit and not ambiguous.

It is a settled rule in the construction of wills, that the intention of the testator must prevail, and that intention is to be collected from the language of the will. 4 Kent's Com., 534-5, and notes. 2 Williams on Ex., 707, 709, 711, top.

W. H. SNEED, for the heirs of James Snodgrass.

1. Specific execution will not be decreed at the instance of defendant in his answer without cross bill. 3 Dan. Ch. P., 1742, et. seq. Title Cross Bill. 10 Hump. Rep., 238, and most especially in this case will specific execution be refused. The agreement with administrators was for *their own benefit*, and specific execution *only of part* under the agreement. *No purchase money was paid by defendant, therefore no injury to him.* Testator had *special regard* for devisees, and intended proceeds of *devise for them*, and specifically executing, would defeat all these considerations.

2. It is submitted that revocation of *devise* by sale, will not pass proceeds into residuum. Revocation of devise or lapse or ademption does not, but the land will go to heir. This is the universal rule, and is recognized in the case of Donohoo, Swan's Rep., 119,

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and it is submitted that there is no reason why the proceeds should take different courses, and that case is the only authority that such proceeds will go into residuum.

3. Devise of lands can only be revoked by *other writing* of equal dignity. This is the universal rule, and the case of Donohoo is not in conflict with it. The instruments here relied upon, are *simple contracts*—and further reviewed still, before they can be effective, *mere verbal proof* must aid the *simple contract writing*, and thus aided be specifically executed *pro tanto*, an agreement made for their own benefit by the administrators with vendee *for part only* of the property, and *to the prejudice of devisees* without benefit to vendee. It is confidently urged this cannot be done.

4. The uncertainty of the agreement cannot be supplied, and thus by *verbal proof constituted definite* as to *terms* or *subject matter*, and then specifically set up and executed; and to be aided in these particulars by *other writing*, such *other writing* must be referred to *in the one to be executed*. 7 Vesey's Rep., 221. 2 Sch. and Lef., 7-8. 1 Sch. and Lef. Rep., 22, 39. 3 Johnson's Rep., 418, 419. 420. 1 Hump. Rep., 325. 1 John. Ch., 273. Gresly's Eq. Ev., 276, and seq. and notes, and authorities there cited.

5. But whenever verbal proof has been admitted it has been on bill filed to *reform the writing* because of *fraud, accident, or mistake*, and to make the instrument *speak the contract*, which for one of these causes it did not do. There are no such *charges* or *proof* in this case.

6. In any event, it is urged that the clause insisted upon here as residuary, will not embrace former devises or bequests which for any reason do not pass

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by the will—but is only operative on the “overplush after the bequests,” and such was the intent of testator as manifested in this clause. 2 Will. on Ex., 896. 3 P. Williams Rep., 40. 12 Vesey, 497. Ambler's Rep., 577. Swan's Rep., 431, and as to such former devisees or bequests testator died intestate.

7. The children of James Snodgrass are heirs of testator and embraced in last clause of will. See the schedule to will—sixth clause of will. The including Joel Gillenwater's children and John Fleming's children as heirs in this clause, is conclusive that *he intended to embrace all his grand children.*

TOTTEN, JUDGE, delivered the opinion of the court.

The plaintiffs bring their bill as administrators, “with the will annexed,” of William Snodgrass, deceased, to have the will construed, and the rights of the devisees and legatees under the same, stated and declared. All persons having an interest in the subject, are made parties to the suit, and the chancellor has proceeded to make his decree therein, from which decree, the “heirs of James Snodgrass” have appealed to this court.

On the 11th May, 1842, William Snodgrass made his will: he died in September, 1849, and at the October term, 1849, of the county court of Sullivan, the will was duly proved, and the plaintiffs were appointed administrators, with the will annexed. In said will are the following clauses.

*Sixth.* “I give and bequeath in like manner, unto the heirs of my son, James Snodgrass, deceased, the two plantations whereon they now reside, with all the appur-

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tenances thereunto belonging, consisting of stock and farming utensils of every kind, and two wagons and five hundred dollars in cash, and six negroes out of them now on the plantation, to be left to a majority of my heirs, to select them out of the family now on the plantation, and the others to go to my other heirs equally divided."

After other bequests, comes the clause as to the *residue*, to-wit:

"As the balance of my estate, if no failures in collection, will be a tolerable sum, it is my wish and desire that the overplush, after the bequests, be equally divided amongst *all of my heirs*; giving Joel Gillenwater's children and John Fleming's children, an equal part, or one share with my other heirs." It is to be remembered that these are children of the testator's daughter who was twice married. James Snodgrass, a son of the testator, died before the date of the will, and his children are William Snodgrass, Ellen, who married Geo. Hardin, and David, Mary, and Catharine Snodgrass, the three last being minors who defend by their guardian.

The bill charges that on the 22d May, 1849, the testator made sale of his lands in Sullivan county to Jacob Lyon, at the price of \$4500, that the sale includes the lands devised to the "heirs of James Snodgrass, deceased, and is to that extent, a revocation of said will, and it insists upon a specific execution of the contract against Jacob Lyon.

Two papers containing said contract of sale are produced, and are as follows:

*First.* "Sullivan county, State of Tennessee, May 22d, 1849. Article of agreement made and entered into



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between William Snodgrass, Sr., of Sullivan county, and State of Tennessee, of the one part, and Jacob Lyon, of Smith county, and State of Virginia, of the other part, *witnesseth*: that said William has this day bargained and sold said Jacob, several tracts or parcels of land, all joining my old residence, also two tracts called the mill tracts, also the Jones' tract, and one half the Canole and J. Snodgrass tract, which said William agrees to give possession against the first day of September, of the whole premises, except so much of the buildings as will suffice to save the present crop now on the land."

"*Teste*: DAVID SNODGRASS,      WILLIAM SNODGRASS,  
    MARY A. LYON,              JACOB LYON."

*Second.* "Title bond for several tracts or parcels of land given 22d May, 1849.

"*Sullivan county, State of Tennessee—Know all men by these presents*: That I, William Snodgrass, of Sullivan county, State of Tennessee, have this day bargained and sold to Jacob Lyon, of Smith county, Virginia, a certain parcel or tract of land, which I said William Snodgrass, bind myself to have said land surveyed and run out, and make said Jacob Lyon a good warrantee deed, in consideration for which said Jacob Lyon, is to pay said William Snodgrass, four thousand five hundred dollars."

*Teste*: DAVID SNODGRASS,      WILLIAM SNODGRASS."  
    MARY A. LYON.

At the same date, Jacob Lyon executed his notes to William Snodgrass, for the purchase money, that is, one note for \$3,000, and another for \$1,500. In his answer, Jacob Lyon says, the lands and the title papers therefor,

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were shown to him at the time of the contract. That the *home place*, called the "old residence," and the other tracts designated, were intended to be sold: offers to pay the purchase money, and insists upon a specific performance of the contract.

The plaintiff's say they have reason to believe and so charge, that the land intended in one of said instruments, was the "*home place*" of the testator, and that intended in the other, was the tract adjoining or contiguous thereto. The *parol* proof makes it clear, that the home place was intended to be sold with the other tracts. The answer of the "heirs of James Snodgrass," concurs in the belief that the "*home place*" was intended to be sold, with the other lands, that the lands devised to them, was the land intended to be sold. That the object of the testator was to convert said lands into money for the use and benefit of said devisees, and to give the money to them, as they had concluded to remove from this State to Missouri; but the testator died before the fund was collected or delivered to them. They insist that said contract is void for vagueness and uncertainty, and resist its execution.

This case may be regarded in several points of view.

*First:* As to the effect of a sale of land by executory contract, where the vendor by his will had previously devised the same. This was the case of *Donohoo vs. Lea*, 1 Swan's R., 119, where the subject is fully considered, and it is *held*, that such sale will operate as a revocation of the will *pro tanto*. In the view of a court of equity, the nature of the estate is changed, the realty is converted into personalty—the vendee is entitled to the land, and the vendor to the purchase money,

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which has become a part of his personal estate. *Walton vs. Walton*, 7 J. C. R., 268.

*Second.* But to have this effect, the contract of sale must be such as a court of equity may, in view of well settled principles, specifically execute. It is true, that in the absence of any valid objection, it is a matter of course to decree the specific performance of a contract for the sale of real property. It is a higher and more perfect remedy than the damages, which a court of law can give for a breach of the contract. 9 Ves., 608. 12 Ves., 395. 4 Peter's R., 311, 328.

As a general rule, "courts of equity will decree a specific performance, where the contract is *in writing, and is certain*, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed; but not otherwise." 2 Story's Eq. Jur., 751. *Denton vs. Stewart*, 1 Cox R., 258. *Cathcart vs. Robeson*, 5 Peter's R., 264.

The contract must be in writing—be certain in its terms, and be signed by the party to be charged with its performance. The *form* of the instrument is perfectly immaterial, as the statute of frauds merely requires that the contract "or some memorandum or note thereof shall be in writing." But the written evidence of the contract must be reasonably certain in *itself*, as to the estate intended to be sold, and the terms of sale; as parol evidence to supply a writing defective in this respect is inadmissible. *Patton vs. McClure*, M. & Y. R., 333. *Baily vs. Ogdens*, 3 J. R., 419. 2 Greenleaf's Cruise, title deed C. 3, and note. 1 Greenleaf's Ev. S., 268. *Parkhurst vs. Van Courtlandt*, 1 J. C. R., 281.

Nor is it necessary that the contract should be con-

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tained in a single document. "It will be sufficient if it can be plainly made out, in all its terms from any writings of the party, or even from his correspondence."

*Third.* But when several papers are relied upon for written evidence of a sale of land — these papers must afford *intrinsic* proof, that they relate to the same contract of sale. Parol evidence is inadmissible to connect them, or to show that they relate to the same transaction. This is a well settled rule under the statute of frauds.

Thus, says Chancellor Kent, (in *Parkhurst vs. Van Courtlandt*, 1 J. C. R., 281,) "I am warranted in considering it a settled principle, that if the court cannot ascertain, with reasonable certainty, the terms of the agreement from the writing, or from some other paper to which it refers, the writing does not take the case out of the statute." "It appears to be equally well settled," says the chancellor, in the same case, "that when the agreement is thus defective, it cannot be supplied by parol proof, for that would be at once to open the door to perjury, and to introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent." The cases to this point are numerous and decisive. *Brodie vs. St. Paul*, 1 Ves., 331. *Olinan vs. Cook*, 1 Scho. & Lef., 32. *Boydell vs. Drummond*, xi East, 156. *Abeel vs. Radcliff*, 13 J. R., 298.

Now to apply these principles to the present case; it is clear that we can only look to the written papers before referred to, for the nature and terms of the agreement between the parties; the parol evidence relied upon to supply these defects, must be kept entirely out of view.

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The first paper after stating a sale of land imperfectly described, is wholly silent as to the price and terms of sale. The second paper mentions a "parcel of land," to be surveyed and conveyed to the vendee for the price of four thousand five hundred dollars. No description whatever is given of the land intended to be sold.

If these papers be taken separately, it is perfectly clear, that as contracts, they are void for vagueness and uncertainty.

Nor can they be taken and construed together as evidence of the same contract for the sale of land. For neither paper makes any reference to the other, nor contains other intrinsic evidence that it refers to the same subject matter or sale. So far as anything appears in the papers themselves, they relate to separate and distinct sales, and so indeed, the bill construes them, as we have seen.

From this view of the case it results, that the supposed sale of the land was merely void, and had no effect to revoke the previous devise, to the "heirs of James Snodgrass," — that the devise remained in force and took effect at the testator's death.

*Fourth.* As to the residuary clause of the will now before us. The testator gives the fund equally to all his *heirs*; except, that Gillenwater's children, and Fleming's children, were to have an equal part or one share with his *other heirs*. We can have no doubt from the context, and other portions of the will, but that by the word *heirs*, the testator meant his *children*. He therefore specially provides that the children of his daughter shall be interested in this fund. He does not provide that the children of James Snodgrass shall take under

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this clause, as in the other two cases, and therefore, we consider that they are excluded. They are not named, nor are they included in the general words of this clause.

Let the decree of the chancellor be modified.

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**ACTION. Jurisdiction. Counterpart of Writ.** In a joint action against several defendants, where they reside in different counties, the court takes jurisdiction for the issuance of counterparts of the writ, by the institution of the suit in the county where one of the *real defendants* resides. It is this fact which confers the jurisdiction by virtue of the act of 1820, ch. 25. That act being designed to promote the convenience of the parties by bringing them all under the same jurisdiction, admits of no evasion of its spirit and intent, by substituting a merely nominal instead of a real defendant in the original writ. It is imperative in its terms, and only authorizes the issuance of counterparts, when suit has been instituted against one of the real defendants, in the county of his residence.

**PLEADING. Abatement. After plea in bar.** When an action is instituted in a county where one of several defendants resides, and counterparts issued to other counties and served upon other defendants resident therein, and before trial a *nolle prosequi* is entered as to the original defendant, it is matter in abatement, and may be taken advantage of after a *plea in bar*, by *plea in abatement*, but not by motion to dismiss.

**SAME. Same.** After a plea in bar the defendant cannot in general plead in abatement, but it is otherwise when the matter in abatement arises after the plea in bar.

**PARTNERSHIP. Evidence. Interest.** Although a partner in an action against the firm may be examined to prove the justice of a debt, after the partnership is proved *alivide*, yet he cannot be heard on a question of the existence of the partnership, for by establishing the partnership in favor of the plain-

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tiff, he onerates his copartner with the debt, and exonerates himself to that extent, as he would be only liable over to his copartner as between themselves for one half. *Vanzandt vs. Kay, et al*, 2 Hump., 112.

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FROM GREENE.

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This was an action of debt brought by Marriott, Frisby & Co., against Wm. G. Stuart & Co., in the circuit court of Greene county. Stuart was resident in the county of Greene, and John Yancey the other member of the firm, was resident in the county of Washington. A counterpart of the writ was issued to Washington, and served upon defendant Yancey, who appeared and defended. Judgment by default was taken against defendant Stuart, and afterward on motion of plaintiff's counsel set aside, and a *nolle prosequi* entered as to him. Two days after the *nolle prosequi* was entered as to Stuart, the defendant Yancey having plead in bar to the action, moved to dismiss the suit on the ground that he had been served with process in Washington, the county of his residence, and the suit was pending in Greene with no co-defendant of record, served with process in said county, which motion was overruled. On the trial the declarations of Stuart were permitted to be proven as to the existence of the partnership, to which the defendant objected. There was verdict and judgment for the plaintiffs, and a motion for a new trial overruled; LUCKY, Judge, presiding. Yancey appealed in error to this court.

T. D. ARNOLD, for plaintiff in error.

This is an action of debt commenced by the plaintiffs in the circuit court of Greene county—William G. Stuart

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resided in Greene county—John Yancey resided in Washington county. The original summons issued in Greene county where the suit was brought, and was executed upon Stuart, the defendant, who resided in Greene county—a counterpart issued to Washington county where Yancey resided, and was executed upon him in that county. See Record, p. 1 and 2.

After the jury was empannelled in the case, the plaintiffs entered a *nolle prosequi* as to William G. Stuart, the party, and the only party, who resided in the county where the suit was brought. See Record, p. 10. Previous to this time, to-wit: at June term, 1852, on Tuesday, the 15th day of that term, a judgment by default had been taken and entered on record against the said William G. Stuart, he having failed to make any defence. See Record, p. 8.

Judgment by default in *debt* is final; could that judgment at a subsequent term be set aside for any purpose? It is believed it cannot be. But it was set aside by the court, and a *nolle prosequi* entered. See p. 10, as above referred to.

Can a *nolle prosequi* be entered upon the original summons, as to the only party who resides in the county where the suit is pending. In other words, can the counterpart stand without the original summons? When the original summons has been dismissed, can you retain the counterpart? After Stuart and the original summons is gone have you any jurisdiction of Yancey, who resides in Washington county, and the counterpart of the original summons which is expressly considered a part of the original summons. See Act of 1820, chap. 25. C. and Nicholson, p. 416.



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The original writ or summons in this case is the *leading process*. Can you dismiss the *leading process* in any case without dismissing the suit? It is believed it cannot be done.

By the Act of 1820, above referred to, and sec. 3d, it is enacted; "In all cases where a suit shall or may be required to be brought against two or more defendants in any one of the courts of this State, who reside in different counties, it shall be *lawful* for the clerk of such court, and he is hereby required, when he issues a writ (summons now) directed to the sheriff of *his* county in which one of said defendants may reside, on application to issue a counterpart or counterparts of such writs to the sheriff of such counties where the other defendants may reside, which, when executed and returned, *shall constitute a part of the original writ, or leading process of such suit in the court to which the same may be returnable*; *Provided*, Nothing in this section contained, shall be so construed as to authorize suits to be brought in a county where neither of said defendants *do in fact reside*." Stuart is no longer a party to this suit. It stands as though he never had been made a party. Then do neither of the parties, (there is but one,) reside in Greene county, and from the time a *nolle prosequi* was entered there was no cause in court, and every subsequent act was void.

The original and leading process is the foundation upon which the whole case stands. That dismissed, the whole suit is gone. Every step you take after that, is directly in the face of the law. You have no party in the county where suit is pending, who has been served with process, and the case of *Rich and others, in error vs.*

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*Raye*, in 2 Hump., 404, help the case out. Nor does the case of *Vanzandt vs. Kay*, and others, authorize a *nolle prosequi* in such a case as this. See 2 Hump., 106.

Did the legislature mean by the Act of 1820, sec. 3d, to allow a party to compel his adversary to travel from Johnson to Shelby, by issuing the leading process in Shelby against his most important witness who might happen to reside there, or who was accidentally caught in the county of Shelby? The cause stands upon the docket, and is litigated for ten years, as is sometimes the case in our courts. The party travels from Johnson to Shelby, 2400 miles every year, in ten years he would travel (24,000) twenty-four thousand miles, at an expense of \$100 every trip, which would be just \$1,000, independent of time in traveling 400 miles out, and 400 miles in. At the end of ten years, the plaintiff comes into court and acknowledges he has no cause of action against the person sued in Shelby, but says he is my main witness, and I now enter a *nolle prosequi* against him. I have cheated the law. I have used the party in Shelby as a stool-pigeon to bring you here, and having brought you here, I acknowledge upon the record I had no cause of action against my witness, but will litigate the case with you here, now I have got you here, and that too where you are an entire stranger, and I am at home in the midst of numerous friends, and large and powerful family connections.

Did the legislature ever mean. when they gave the counterpart of the writ, to put it in the power of one man to harrass and oppress another to this extent? I think not. I think it is not the law. The case of *Rich, et al vs. Raye*, 2 Hump., 404, which was relied upon by

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his honor the circuit judge, as settling the law of this case, it is confidently believed does not touch it. In that case there was a plea in abatement. The court held the plea bad in substance and in form. The plea impeached the motives of the plaintiffs, alledging that the parties in Jefferson had been summoned, out of fraud, and guilefully to cheat the circuit court of Grainger out of the jurisdiction. There was no *nolle prosequi* in that case, but a verdict as to all the parties, some guilty, some not guilty.

Here is a *nolle prosequi* as to the only party that gave the court jurisdiction of the cause. The jurisdiction of the whole case is gone, it is most confidently believed. You cannot destroy the *substance* and retain the *shadow*.

Our acts of assembly authorizing counterparts, is an innovation upon the common law proceeding, and must be construed strictly. The act of 1820, § 3d, says, "provided nothing in this section contained, shall be so construed as to authorize suits to be brought in a county where neither of said defendants do in fact reside, &c." The moment a *nolle prosequi* is entered against William G. Stuart, he stands as though he never had been sued in the case. There being no other party in the county, no counterpart could issue, or if issued, could not be retained. The right of being sued at home, is a very important right, that a man should not be cheated out of. There are important advantages attached to it. This we all know. This the legislature manifestly thought. They positively assert that you shall not issue a counterpart, unless one of the parties reside in the county where the suit is brought. You cannot sue the maker

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or drawer of a promissory note, bill of exchange, or other negotiable instrument, by serving a counterpart of the summons upon him. The original writ must be served on some one of them, or they are not bound to answer. This shows the legislature felt the difficulty and danger of counterparts of writs, and that there was a material difference between the leading process and the counterpart. This same distinction is made in the act of 1820, Sec. C. and N., 416, 417.

Nor does the act of 1835, chap. 87, authorizing a *nolle prosequi* to be entered in all suits, &c., help them out of this difficulty. For it is supposed, that it will not be contended that this law repeals or modifies the law of 1820, which prohibits a counterpart, where some one of the parties do not *reside* in the county where the suit is brought.

But it may be said, we ought to have plead in abatement. This we could not do at the time the *nolle prosequi* was entered. All was right up to that time, *prima facie*. The return term had long since elapsed. Issue was taken upon the plea of *Nil debet*—and a plea in abatement could not have been pleaded at that stage of the cause. A motion to dismiss or strike the cause from the docket, was the proper motion.

The merits of the case are altogether with the defendant. The weight of proof is overwhelming, that there was no partnership, and that Yancey was only a friend and guarantor, and in that respect felt interested in the success of the concern, and wished to see that his liabilities as guarantor were liquidated.

His honor, the judge, on this point, allowed the declarations of Stuart to be given against Yancey, to prove

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that Yancey was a partner. This was error. See 3 Starkie, part iv., p. 1070, 1, 2, and 3.

Although the declarations of each individual member or admissions of a firm, that he is a partner, is evidence to charge himself, it is no evidence of the fact against any other party. See 2 Greenl., part iv, § 483, 484, beginning at figure 5 in section 484, p. 308. 2 Hump., 106, *Vanzandt vs. Kay, Thomas & Co.* Also, 10 Hump., 483, *McKenny vs. Patterson & Grosvenor.*

D. T. PATTERSON, for defendants in error.

This is an action of debt brought by Marriott, Frisby & Co., merchants of the city of Baltimore, against William G. Stuart and John Yancey, copartners, trading under the firm and style of W. G. Stuart & Co.; before the trial a *nolle prosequi* was entered against William G. Stuart, and the suit prosecuted to judgment against John Yancey alone.

The proof in the record is conclusive, that Yancey was the partner of Stuart, and a member of the firm of William G. Stuart & Co., and there can be no sort of question raised as to the insufficiency of the proof, or that the verdict of the jury is not fully sustained by the testimony.

But it is urged that the court below, erred.

1. In refusing to dismiss the suit of the plaintiffs on the motion of the defendant in the court below, on the ground that the circuit court of Greene county, had no jurisdiction of the cause.

The third section of the act of 1820, N. & C., p. 416, authorizes the clerks of the circuit courts of this

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State, where a joint suit is brought, and the defendants live in different counties, to issue counterparts of the summons to the Sheriff of the county, where the defendant or defendants may live. Under this act, a suit cannot be brought in a county where neither of the defendants in fact live, or a suit, local in its character, in a county other than that which is now required by law. This is an action of debt, not local, but transitory in its nature. Nor is it pretended that Stuart, at the date of the original summons, was not a resident of the county of Greene, where this suit was brought. See act of 1820, N. and C., p. 416.

But suppose for the sake of the argument, that the circuit court of Greene county had no jurisdiction of this cause, after a *nolle prosequi* was entered against Stuart, then the plaintiff in error could not avail himself of this want of jurisdiction by mere motion, but must plead in abatement. Act of 1820, p. 416. *Rich et als. vs. Rayle*, 2 Hump. R., p. 404. Gould on Pleading, chap. 5, § 13-30, p. 231, 234. Chitty's Pleading, p. 475, 476, 477, 478, and 479.

The plaintiff has the right in all cases, to enter a *nolle prosequi* against a defendant or defendants, and proceed against the remaining defendant or defendants. as though the suit had been originally instituted against him or them alone. See act of 1835, N. & C., p. 542.

2. It is insisted that the court erred, in allowing the plaintiffs below to introduce William G. Stuart, as a witness to prove the justice of the demand, sued on in this suit. The circuit court had the clear and undoubted right to permit Stuart to be examined as a witness, to

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prove the account sued on, but to prove no other facts in the cause.

The partnership, between Yancey and Stuart was fully and satisfactorily made out by the testimony of David Brown, before Stuart was offered as a witness. (See Brown's testimony, p. 20, 21, and 22, of the Record.) The plaintiffs below offered to prove no other fact, and indeed proved none other by Stuart, than that the account sued on was a just one. (See p. 28 of Record.) As to Stuart's competency to prove the fact, he was introduced to establish—see *Vanzandt vs. Kay, Thomas & Co.*, 2 Hump., 106.

3. It is insisted, by the plaintiff in error, that the court below erred in permitting the declarations of Stuart as to Yancey being a partner of the firm of W. G. Stuart & Co., to go to the jury.

The plaintiff below did not offer to prove the declarations of Stuart, until after the partnership had been fully proved by the admissions of the plaintiff in error himself. See Brown's testimony, p. 20 of Record. And certainly there can be no objection to proving by the declarations of Stuart, a fact that the plaintiff in error himself had admitted to be true. But if there was any thing in this objection, the plaintiff in error is not in a position to avail himself of it. By the cross examination of Stuart, as to matters not asked about in chief, he made him his own witness, and by him the plaintiff in error makes out fully the fact, that he was a member of the firm of W. G. Stuart & Co. 1 Greenl., sec. 445. 14 Peter's Reports, 448, 461. Roscoe's Crim. Evi., 84, 85, 86. 1 Greenl., § 177.

But suppose there was error in permitting declara-

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tions of Stuart to go to the jury in the first place. These declarations were in substance and effect taken from the jury by the court. When Stuart was offered as a witness, the court held that he was competent to prove the justice of the account sued on in this case, but not to prove any other fact—or that Yancey was a member of the firm of W. G. Stuart & Co. See p. 27 and 37 of the Record.

A new trial will not be granted, where the court can see that the jury have not been misled, and substantial justice has been done by the verdict between the parties. *Gregory vs. Allen, M. and Yerger*, 77. *David vs. Bell and wife*, Peck's R., 135-6. *Kelton vs. Blevin*, 1 Cooke, 102. Graham on New Trials.

T. A. R. NELSON, for defendant in error.

1. There was no error in allowing William G. Stuart, one of the partners, to prove the justness of plaintiff's account, as his examination in chief was restricted to *that*; and all other facts proved by him were brought out on cross examination. See Record p. 26, 36. *Vanzandt vs. Kay*, 2 Hump., 110 and 112, (cited in 2 Meigs' Dig., 1053, No. 20.)

In England and New York, it is held that a partner, who is not a party to the record, may be examined as a witness to prove the partnership. See Collyer on Part., § 787. And, in a late case it has been held, in England, that a partner who is a party to the record, may be examined. *Ibid.* § 792.

All the cases, however, agree that if the partnership is established *aliunde*, one of the partners may be exam-



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ined to prove other facts in the cause. Collyer, § 788, § 789, § 790.

2. There was no error in allowing David Brown to prove Stuart's acknowledgments of the existence of the partnership, as the evidence was not objected to. See p. 47, and it was brought out on cross examination, p. 20. And especially as the existence of the partnership was previously proved by Brown. See Record, p. 20, 37. Collyer, § 779, § 688. 1 Greenl. Evi., § 177, p. 233, § 527 a.

CARUTHERS, J., delivered the opinion of the court.

After judgment, final by default against Stuart, and at the next term of the court, upon motion, the same was set aside and a *nolle prosequi* entered as to him. Two days after this proceeding, the cause came on to be tried, against John Yancey, the other defendant charged as a partner. After the jury was empannelled, the defendant Yancey moved to dismiss the suit upon the ground, that it was brought in Greene county, and the original writ served there upon Stuart, who was a resident of that county, and a counterpart served upon him in Washington county, where he resided. He insists that the court had no jurisdiction of the case after it was dismissed as to Stuart.

In transitory actions, it is the service of the writ or summons in the county where the suit is instituted, which gives the court jurisdiction of the person. It often happened that persons jointly liable, lived in different counties, and consequently they could only be made responsible, by distinct and several suits in their

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respective counties. To remedy this inconvenience, the act of 1820, ch. 25, was passed, by which counterparts of the original process could be issued, so as to bring all that were jointly liable to one jurisdiction. But the *proviso* restrains the Act to cases where the suit is brought in a county, where one of the defendants "does in fact reside." Car. & Nich., 416, § 3. It will not do to hold that under this Act, the mere fact that the original summons is served upon some resident of the county, where the suit is brought, who is made defendant and discharged before the trial, will give jurisdiction to the court, against a resident of another county, who is brought in by a counterpart. If this were so, there would be no difficulty in any case in drawing a man out of the jurisdiction, where he has a right to be tried, no matter to what inconvenience and hardship it might subject him and his witnesses. It was the intention of the legislature to save the expense and trouble of a multiplicity of suits on the same cause of action, by bringing all the parties into the county, where one of the material defendants might reside.

But this is matter in abatement, and cannot be taken advantage of by motion to dismiss, as was done in this case. The same statute prescribes the mode of defence to a suit improperly brought in this respect, *thus*, "but the same may be abated upon the plea of the defendant." There is perhaps no other mode by which the objection can be made available. It is true that in general after a *plea in bar* to the action, the defendant cannot plead in *abatement*; but it is otherwise when the matter in abatement arises after the plea in bar. 1 Chitty on Pl., 441. In this case the suit was against

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John Yancey vs. Marriott, Frisby & Co.

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Stuart & Yancey as partners, and there was no ground of objection until the *nolle prosequi* as to Stuart, only two days before the trial. It was not until that was done, that a ground for abating the suit existed, and he would then have been entitled to the benefit of it by plea, but not by motion.

*Secondly.* The defendant insists that he is entitled to a new trial for errors in the admission of evidence. The defence of Yancey was placed mainly upon the ground that he was not a partner of Stuart, to whom the goods were sold, under the name and style of Wm. G. Stuart & Co. David Brown was introduced by the plaintiffs as a witness to prove that Yancey was a member of the firm. After stating the acknowledgments of Yancey that he and Stuart were the owners of the store, he was asked to state what he may have heard Stuart say on the same subject; to which objection was made and overruled, and the witness permitted to prove the "declarations of Stuart as to Yancey's being his partner in business." This was erroneous. He was not a competent witness for that purpose. *Vanzandt vs. Kay, et als.*, 2 Hump., 112. Much less would his declarations, not on oath, be evidence. 1 Greenl. Evi., 229. He is directly interested in the question. By establishing the partnership in favor of the plaintiffs, heonerates the defendant with the debt, and exonerates himself to that extent, as he would be only liable over to the defendant, as between themselves for one half. It is true, a partner may be examined to prove the justice of the debt, if the partnership be admitted or established by other evidence, but he cannot be heard on a question of the existence of a partnership.

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Upon this ground the judgment is reversed and a new trial granted.

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REUBEN LISENBEE vs. JESSE HOLT.

**ACTION.** *In forma pauperis. Rights of Non-residents.* The right to institute and prosecute suits *in forma pauperis*, in the courts of this State, is not limited by its laws to the citizens of this State, but belongs alike to the citizens of the other States.

**STATE COMITY.** *Same.* It is due to that comity which should be fostered among the several States of this Union, that the citizens of all, should be free and unmolested in vindicating their rights in the courts of this State. Such has always been the policy of our legislation, and the spirit of judicial decision; and our courts will construe no statute, so as to place it in conflict with this principle, unless constrained to do so, by its express provisions, or by some rule of obvious and necessary policy, or fixed principle of international law.

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FROM GREENE.

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This case originated before a justice of the peace, in the county of Greene, upon a warrant founded on a note executed by the plaintiff in error, a citizen of North Carolina, to the defendant in error. On the 14th of December, 1842, judgment was rendered by the justice on the note against the plaintiff in error, for the sum of \$147 90, and on the same day, on the affidavit of defendant in error, that the plaintiff in error was about to

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remove or conceal himself or his property, execution was issued and levied upon certain chattels of the plaintiff in error. On the 20th December, the plaintiff in error brought up the case by *certiorari*, *in forma pauperis*, to the circuit court of Greene, where at February Term, 1852, on motion, the court (Hon. S. J. LUCKEY, presiding) dismissed the *certiorari*, and affirmed the judgment of the justice, holding that the plaintiff in error being a resident citizen of another State, was not entitled to prosecute a suit *in forma pauperis*, in the courts of this State. From which, plaintiff in error appealed.

D. T. PATTERSON, for plaintiff in error.

The act of 1821, makes it the duty of the clerks of the different courts of record in this State, on the application of *any poor person*, who shall take the paupers oath, to issue any writ or writs according to the nature of his case, without demanding security from said poor person. N. & C., p. 533.

The phraseology of the act of 1821, is broad and comprehensive enough to embrace every person, without regard to residence, who may seek redress in our courts for any injury they may have sustained at the hands of our citizens, and it is argued earnestly by the counsel for the defendant, that by the phrase "any poor person," the legislature intended to extend to the citizens of other States, the same right to avail themselves of the benefit of the provision contained in said act, that our own citizens have, to institute suits under its provisions, any other construction of the language used by the legislature, it seems to me, would be doing violence to the

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intention of the framers of the act of 1821. Why should our courts give a local and restricted operation and construction to the language of the act of 1821? Would it not be wanting in proper comity toward the citizens of other States to do so? Would it not amount practically, to a denial of justice to the poor of other States, who might receive from our citizens, either in their person or property, an injury. To show the great injustice that would be inflicted on the non-resident pauper, by the construction contended for by the counsel for the plaintiff, let us suppose that a poor man from the State of North Carolina, is passing through the State of Tennessee, on his way to the West, for the purpose of hunting a new home for himself and family—and while within our borders, he is violently assaulted and injured in his person by a wealthy and influential man. Or that while within our State, his only horse is taken from him without the warrant of law, will our courts say to this unfortunate stranger, that you should not institute a suit in the courts of the State for the redress of the injury you have received within our own borders, and from the hands of one of our citizens, unless you give security; requiring a thing that in nine cases out of ten, it would be impossible for the non-resident poor man to comply with. He would not know to whom to apply for aid, and if he did apply to our citizens to become his security for the prosecution of his suit, he would be told that he was a stranger, and that the defendant was his neighbor and friend, and that he would not have anything to do with the suit. Every man who has ordinary observation, knows this would be the case, and thus to all useful purposes, the doors of our courts of

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justice would be closed to the non-resident poor man, and the most wanton violation of the rights of property, and the most flagrant outrage on the person of the poor man, would go unredressed and unpunished; simply because he happened to live beyond the limits of the State of Tennessee. Would it not be monstrous to discriminate between one of our own and the citizen of a different State, to an extent that would result in such great injustice to the non-resident. To do so would be to violate the spirit, if not the letter, of the Constitution of the United States. By art. 4, § 2, of the Constitution of the United States, it is declared, that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Now to require security of the one, and not of the other, would be to deprive them of the privileges and immunities there guarantied. I am aware that our own court, in the case of *Kincaid vs. Francis*, Cooke's Reports, p. 49, decided that this provision in the Constitution of the United States, would not prohibit the State from enacting that a resident plaintiff might commence suit, without giving security for costs, and that a non-resident plaintiff should not. But this question was not presented in the record, in the case of *Kincaid vs. Francis*, and the opinion must therefore be regarded as the mere *obiter dicta* of the Judge who delivered it.

The statute of 11 Henry, 7th, chap. 12, uses almost the identical language of our statute of 1821, and I have looked into all the English books that I have access to, in order to see whether the courts of England have at any time given a construction to their own statute, but I have been unable to find any decision.

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Nor can I find any decision of our own Supreme Courts, giving a construction to our act of 1821.

It is insisted by the plaintiff's counsel, that our own Supreme Court, in the case of *Hawkins vs. Pearce*, reported in 11 Hump. Rep., p. 44, 56, by analogy have decided this case. Let us examine that case for a moment. Pearce was a resident of the State of Georgia, and while transiently in this State, Hawkins, a constable, levied on the horse of Pearce, and sold it for debt. This court in that case, held that the act of 1820, and the subsequent acts exempting certain property from execution, do not extend to non-residents, and give conclusive reasons why they should not. It will be observed that the legislature, by the act of 1820, confines its operation to "each individual in this State," and the act of 1827, is confined to "any person in this State," thus clearly indicating that the legislature intended to embrace none but our own citizens. In my view of the act of 1821, and the various acts exempting property from execution, nothing can be drawn by analogy, from the opinion of this court in the case of *Hawkins vs. Pearce*. The object of the act of 1821, is wholly and totally different from the act of 1820, and the subsequent acts on the same subject. The act of 1821 is designed to give to "any poor person," the right to sue in our courts without security. The act of 1820, and the subsequent acts on that subject, when taken and construed together, it will be seen that the legislature intended to confine their operation and effect to the "individuals" or "persons" of this State.

It is argued that nothing can be deduced from the adjudications of this court, under the 19th section of the



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act of 1794, in relation to attachments. The case of *Kincaid vs. Francis*, Cooke's Reports, p. 49, and the case of *Webb & Co. vs. Lea*, 6 Yerger, 473-4, are both unreasoned decisions. But they settle nothing which can, it is conceived, by any fair deduction or analogy of reason or argument, deprive the defendant of suing as a pauper. These cases simply adjudge, that if the *creditor* and *debtor* both be non-residents, the act does not operate.

• **MILLIGAN**, for defendant in error.

In the Record, it appears that the plaintiff in error is a citizen of the State of North Carolina, and that he obtained the writ of certiorari and supersedeas, by means of the oath prescribed for the benefit of poor persons.

The court below held that a non-resident was not entitled to prosecute suits in this State, *in forma pauperis*, under the act of 1821, ch. 22, O. & N. p. 533, and this is the only question presented in this record.

1. The act of 1821, ch. 22, is strictly municipal in its character, and made for the exclusive benefit of a certain class, a particular description of our own citizens. It is a part of that humane and benevolent system of legislation in Tennessee, which looks to the support, and maintenance of the poor within the limits of the State. For it is no less important to the poor man, that he should have the means of enforcing his rights in the courts of justice, without costs or charges, than that he should be allowed to hold certain articles of property exempt from execution.

2. This question, it is insisted, if not directly decided in Tennessee, is by analogy no longer open for discus-

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sion. See 11 Hump., p. 44, *Hawkins vs. Pearce*. 1 Burrow's Rep., 347, *Rex vs. Lockdale, et als.*

1. By this authority, *Hawkins vs. Pearce*, it is declared, our acts of Assembly from 1820, ch. 2 to 1846, ch. 169, constitute a system of poor laws for a given class or description of persons in the State, and that non-residents, who may be casually or transiently in the State, are not entitled to their benefit. It is insisted, that the act of 1821, ch. 22, is a part of that system; because it is not only comprehended by the scope of the opinion of this court in the case above referred to, but because it is supported by the very same reasons which sustain the act of 1820, ch. 2, and those subsequently passed, exempting property from execution in the hands of the poorer classes. Both are founded in benevolence to the poor within the State, and seek their protection, comfort and support.

2. But it is insisted by the counsel for the plaintiff in error, that the words, "any poor person," employed in the act of 1821, ch. 22, are much broader and more comprehensive than the words, "each individual in this State," used in the act of 1820, ch. 2, and retained in most of the other acts exempting property from execution. It is true, the words "in this State," which occur in the act of 1820, are not employed in the act of 1821; but the words, "any poor person," in the act of 1821, are no more comprehensive than the language of the 3d § of the act of 1846, ch. 169, which is: "That the provisions of this act, and the other acts which exempt property from execution, be extended to all persons who are heads of families," and this court in the case of *Hawkins v. Pearce*, expressly

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declare this act, (1846,) one of the acts comprehended in the system of poor laws, the privileges of which cannot be claimed by non-residents. As to act of 1846, see Nicholson's Supplement, p. 231.

3. The act of 1794, ch. 1, § 19, C. and N., p. 101, in relation to attachments, contains the very same words of the act of 1821, ch. 22, that is: "Any person, &c., making complaint, &c.," and yet this act has been held not to apply to non-residents. See Cooke's Rep., *Kincaid vs. Francis*, p. 49, 53. Also, 6 Yer., *Webb vs. Lea*, 473-4.

4. The 4th art., 2d §, and 1st clause of the Constitution of the United States, is relied on by the counsel for the plaintiff in error, to sustain the view entertained by him of the act of 1821; but, as I insist, that clause of the Constitution brings no support to the position assumed by the counsel. It simply declares each citizen of a State, a citizen of the United States, and as such, confers on him rights and privileges throughout the whole Union. If this were not so, then a citizen of our State, would not be a citizen of the United States when in another, and the States would be completely foreign, and the citizens of one, *aliens* when in another.

So I conclude there is no argument to be drawn from the Constitution of the United States, which conflicts with the ruling of the court below in this cause.

For these reasons, I insist the judgment of the circuit court ought to be affirmed.

CARUTHERS, J., delivered the opinion of the court.

The only question presented in this case, is, whether non-residents are embraced in the provisions of the act

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of 1821, ch. 22, authorizing suits to be brought by poor persons, without giving security for costs.

We can see no reason for the exclusion of non-residents from the benefit of this act. They are not excluded in terms or by any fair construction. It would be against that comity and good neighborhood, which should exist and be fostered by the several States, toward the citizens of each other, to make a distinction between them as to the mode of asserting their rights. Courts should not be open to one and closed against the other. We would not give such a construction to any act of our legislature, unless constrained to do so by its express provisions, or some rule of clear and necessary policy or fixed principle of international law. There is nothing in the act indicating an intention to confine its benefits to citizens of our own State. The language used is general, "any person who shall take the oath hereinafter prescribed."

The case of *Hawkins vs. Pearce*, 11 Hump., 44, in which the benefits of the acts of 1820, ch. 11, and sundry others on the same subject down to 1846, ch. 169, exempting certain property from execution for debt, was certainly correctly decided. But the reason and principle of that case do not apply to this. In most of those acts, perhaps all but the last, the provision is expressly for citizens of this State. But independent of this fact, a sound policy would so limit them. Their object is to secure benefit or the means of living, to the families of those of our own people, who by misfortune or providence become involved beyond their ability to pay. It was thought better, and more in accordance with humanity, and the interests of the State, that creditors should

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lose their just claims to that extent, than that the wives and children of unfortunate debtors should be reduced to entire destitution, and possibly become a charge to the community. These reasons and objects could not be made properly to apply in the case of citizens of other States, who might be indebted to ours. We are under no obligation to make provision for them. They must look to their own governments for protection.

But here the question, we think, is certainly different. It is whether our courts shall be open to non-residents for the assertion of their rights on the same terms as our own citizens. Shall a stranger, because he is poor and friendless, be denied the aid of our laws in the recovery or defence of his rights? We think not. Such could not have been the intention of the legislature.

Let the judgment of the court below be reversed, and the cause remanded.

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GEO. W. RICE vs. E. ALLEY, assignee of Thos. Calloway.

1. PRIVATE WAY. *County Court. Constitutional Law.* The county court has no power to compel a private person at whose instance a *private way* is opened through the lands of another, to pay damages for such private way. The consent of the parties cannot confer with such jurisdiction. The right of a private way can only exist by prescription or convention between the parties, and not by judicial compulsion. The Act of 1811, ch. 60, which authorizes the construction of private ways, upon the petition of any person whose lands may be surrounded by the lands of another, upon peti-

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tioner's paying damages, is repugnant to the constitution, as violative of private right. *Vide* Cons., Art. 1, § 8, *et* 2 Yerg., 554-560.

2. **LIMITATION.** *Demands founded on record.* Debts and demands based upon any specialty, as a statute, bond or record, are not, in general, affected by the Statute of Limitations. 21 Jas., 1, C. 16. But the record on which such demand is founded must be valid in itself. So, where a defendant in an action of debt produced the record of the county court, from which it appeared that the county court, more than six years before, had adjudged the plaintiff indebted to him a sum of money as damages for a private way through the lands of defendant, and from which it appeared also that he and the plaintiff had agreed upon said sum as the amount to be paid for said private way, and claimed that said record demand be set-off against the demand of the plaintiff; *Held*, that as the county court had no power to make such order, said agreement must be considered as a simple contract, and therefore barred by the Statute of Limitations.

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FROM MARION.

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This suit was instituted by Alley against Rice, before a justice of the peace, in the county of Marion, on a note under seal, executed by Rice, which resulted in a judgment against the plaintiff for costs; from which he appealed to the circuit court. On the trial of said cause in the circuit court, at its March Term, 1853, Rice produced the subjoined proceedings of the county court of Marion county, as evidence of debt against Alley, and demanded that the same should be allowed him as a set-off against the note, upon which the suit was founded:

*"State of Tennessee: Marion county.* October session, 1841. Be it remembered, that on this day were returned into court, the proceedings of the jury of view, on the road from Kellysville, intersecting the stage road at Marcum's old house, which said "agreement" is returned in words and figures following, to wit:

*"State of Tennessee: Marion county.* We, the un-

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Geo. W. Rice vs. E. Alley, *assignes of Thos. Calloway.*

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dersigned, appointed by virtue of the within order, say that the damages due and owing to George W. Rice from Erasmus Alley, for the road agreed upon between them, shall be the sum of three hundred dollars, to be paid by Erasmus Alley to Geo. W. Rice, and that said Rice have until the 1st day of January next to open the same, and to fix the fences and enclosures to suit said road; otherwise, said Alley, by performing said labor, may be allowed to do the same. September 28th, 1841. Signed by the commissioners, and Geo. W. Rice and Erasmus Alley; and ordered by the court, that said order be made final."

The circuit court, (Hon. Charles F. Keith presiding,) charged the jury that the claim evidenced by the paper above quoted, introduced by the defendant as a set-off, to plaintiff's debt, was such a claim as would be barred by the statute of six years; and if a longer period than six years had elapsed, between the making of said paper and the commencement of this suit, that said claim would be barred. The jury rendered a verdict, and judgment was entered for plaintiff Alley, for the amount of his note and interest, from which Rice appealed.

MINNIS, for Rice.

This is an agreed case from Marion county circuit court, and raises this point: Where a party seeks to open a road through the land of another, and gets a jury to assess damages, and the jury report the damages, in this case the report is signed by the parties themselves, and is in the character of an agreement and report, and that report made a part of the record of

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the county court, whether this claim will be barred by the statute of six years, see pp. 8 and 9 of this record.

It is insisted for plaintiff in error, that this is not a simple contract, but that it is debt evidenced by record, and is not barred by statute of 21 James, 1, ch. 16, § 3, limiting simple contract debts to six years; and that it is not barred by our statute of 1715, to three years.

HYDE, for Alley.

The only reasonable ground, to my mind, upon which an argument could be based, in support of the position taken by the plaintiff in error, is the principle laid down by Bouvier in his *Institutes of American Law*, vol. 1, p. 382, couched in the following language:—"When the liability of the defendant is created, not by the act of the parties, but by the express terms of a statute, the plaintiff is not barred."

To give application to this principle a liability must be created by the statute, and it must arise under its provisions as expressed.

To create a liability, implies an obligation on the part of the party liable, which is to be performed in the future. Certainly, if no debt or obligation remains to be paid or performed in pursuance of the provisions of the statute, no liability is created thereby. The Act of 1811, ch. 60, § 1, on the subject of private ways, is illustrative of this position. By this act, any person surrounded or inclosed by the lands of another, who refuses to allow such person a private road, on petition,



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a jury may lay off and mark a road, and the court shall have power to grant an order to open, &c.; *provided* the damages assessed be paid by the person applying, &c. By a plain construction of this statute the county court would have no authority to order the opening of the way prior to payment. If the parties stipulate a future payment the liability created is the result of a private contract, and does not arise under the terms of the statute. The act of 1825, ch. 17, § 1, is equally explicit in reference to the establishment of a public road in cases where damages have been assessed by a jury, by the terms of which the liability ceases when the road is established, otherwise its establishment is unlawful. If the person entitled to damages agrees that the payment may be in future, the liability is created by the act of the parties and not by the express terms of the statute.

Upon the supposition that a liability for damages assessed by a jury under the statutes referred to, could in any case, be created under the provisions of the statute, yet it will not be denied, that to create the liability the county court must pursue the authority conferred by the statute, otherwise its proceedings would be illegal and void. By the act of 1804, ch. 1, § 19, upon complaint of the person aggrieved by the laying out of any road, the county court may order a jury to assess the damages to be paid by the county, or turn the road, &c. By the act of 1825, before referred to, payment of the damages assessed is made a condition precedent to the opening or establishment of the road by the county court. By these acts the duty of the jury and the court are clearly defined; the

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one is to assess damages to be paid by the county or turn the road, and the court, on payment of the damages assessed, are to establish the road.

The writing relied upon by the plaintiff in error, purports to be the proceedings of a jury of view to assess damages resulting from the laying off of a public road, from "Kellysville" to "the stage road." The caption also clearly indicates that the jury do not return the paper as a report of the damages assessed, but as an "agreement" returned, &c. The body shows that there is no assessment of damages upon the road as previously laid off by order of the court, but damages upon a road agreed upon between Rice and Alley. The three hundred dollars is not to be paid by the county, but by Alley, although the money is not paid, but "to be paid." By stipulation, Rice is to have over three months in which to open the road; and should he fail Alley is authorized to open it. If this writing is to be regarded as the proceedings of the jury, its provisions and stipulations are in express violation of their authority as conferred by the statute, in every particular; and, consequently, any action of the county court, confirmatory of their proceedings, or any order based upon them, would be void. If, then, in a case where the provisions of the statute referred to are pursued, a liability might be created, yet, where the plain provisions of the statute are violated and the proceedings are wholly illegal, as in this case, certainly no liability could arise by the express terms of a statute which are disregarded in creating the liability.

Divesting this writing of the unauthorized proceedings of the jury of view, and it remains, what it

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was doubtless intended to be, a simple contract in writing between Rice and Alley, witnessed by the jury, and as such, strictly within the bar of the Statute of Limitations.

Should this court hold the charge of the court below to be clearly erroneous, it is submitted whether that error, in itself, would afford a sufficient ground for a reversal of the judgment in this case. The Statute of Limitations could only apply to the right of way demand relied upon in defense by the plaintiff in error, unless presented by way of set-off, of which there was neither notice or plea filed, as is apparent from an examination of the record. A set-off being a cross action, requiring notice, by plea or otherwise, of the nature of the demand, so as to give the party affected thereby an opportunity of preparing his defense, and no notice having been given, the demand of the plaintiff should have been excluded on that ground; and no injury has resulted to the plaintiff in error in the exclusion of his set-off, if upon any ground it was not available, although it should be held that a wrong reason for its exclusion was assigned by the court below.

For these reasons we ask an affirmance of the judgment below.

TOTTEN, J., delivered the opinion of the court.

This action is debt; the defense is set-off, which being denied in the court below, the defendant appealed in error.

The matter of set-off is imperfectly stated in the record; but it seems that, by order of the county court of Marion, Alley was permitted to open a road

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over Rice's farm. A jury was appointed by said court to assess the damages done, and they assessed it by *consent of parties*, at \$300, and made report thereof to the county court at October Term, when it was ordered that the same be affirmed. The report states that Alley "agrees" to pay Rice \$300, and the same being due more than six years before the institution of this suit, the circuit judge held it barred by limitation of time.

It is now argued for defendant Rice, that no statute of limitation will apply, because it is a liability founded upon a record.

That is true as a matter of fact but not as a matter of law. For the county court had no jurisdiction to make such an order upon its record. If a public road were intended in that case, the private indemnity was due from the public, and the county court as a court of police, had power to order it to be paid by the county; 1804, ch. 1, § 19; but no power, even by consent, to make a valid order that it be paid by a private person; for consent in general, cannot confer jurisdiction. If a private way were intended, in that case we have held, that the right can only exist by prescription or convention between the parties, and not by judicial compulsion, under the act of 1811, C. 60, and this act was considered repugnant to the constitution, as being in violation of private right. *White vs. Settle*, at Nashville, 1852. In any view of the case it must be true that the county court had no jurisdiction to order that Alley pay Rice the indemnity in question; and its order to that effect, must be considered as merely void.

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William Worth vs. Amos Dawson and William Fowler.

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It is in general true, that demands founded upon any "specialty," as a statute, record, or bond, are not affected by the statutes of limitation. 21 Jas., 1 C. 16; Ang. Lim., C. 10. But here, the record relied upon is invalid in itself, for want of any power in the court to make it, and cannot be considered as the foundation of a right. The right to indemnity was agreed upon by the parties, but as there was no valid specialty to secure its payment, it must be considered as founded merely in simple contract, and is barred by the statute.

Let the judgment be affirmed.

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WILLIAM WORTH vs. AMOS DAWSON AND WILLIAM FOWLER.

**Highway. Dedication. Right of Way.** The mere license of the owner, to the *inhabitants of a local neighborhood*, to use a pathway through his close, at sufferance, as a matter of favor and convenience, does not operate as a dedication of the way to the *public* use. The doctrine that a right of way may be claimed, by a dedication to the public use by the owner of the soil, must be cautiously admitted, as its too easy application would defeat the right of the owner of the soil to have compensation for the damages sustained by laying out a road over his land, to which he is entitled, where such road is laid out by the proper authority.

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FROM COCKE.

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The plaintiff in error, owned and occupied a field in the county of Cocke, which had been cleared and cultivated about fifteen years, through which there was a path which had been used before and since its enclosure,

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by some of the neighbors for a period altogether of nearly thirty years, as a mill and church path, also as a way to the village of Parrottsville. Some seven families in the vicinity had used the way, and had occasionally repaired it when it needed work. When the field was enclosed, gates or bars were erected where the enclosure crossed the path on either side. The original proprietor of the soil, who enclosed the field, had been known to assist the neighbors in repairing the way. This action, which originated before a justice of the peace, was brought by Worth against Dawson and Fowler, to recover damages for alleged injuries to his soil within the enclosure, by "digging it," for the purpose of repairing the way. It came into the circuit court by appeal, where there was verdict and judgment for defendants, (Hon. R. H. HYNDS, presiding,) from which plaintiff appealed to this court.

ARNOLD, SNEED AND TEMPLE, for Worth.

The legal proposition, or series of propositions relied upon, are these:

That from the character of the way, and as there were only a few persons who traveled along it, and that only for their private convenience, it never was a public road, but was merely a private easement or way.

That the act of enclosing the field, and obstructing the road, was, *per se*, a revocation of the right to the easement.

That the building of the fence around the field, and across the path, was sufficient notice of the revocation of the right.

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That the use of it afterwards, was merely by the sufferance and at the will of the owner of the field.

That defendants had lost their right, if they had derived any from prescription, to the easement, by their long acquiescence in the obstructions to its perfect enjoyment.

That they had no right to work on the road or way, since they acquiesced in the obstructions.

That at most, they had only a right of passage as private individuals, a limited or qualified right of way, which communicated no right to go upon the soil, and dig it up or disturb it. See 2 Saunders, 921, near the bottom. 2 Greenl. Ev., § 664. 3 Kent, 432-3. 2 Blackstone, 27, note 28.

FLETCHER, for Dawson and Fowler.

The only part of the charge of the court seriously controverted in this cause, is that in which his honor told the jury, that "enclosing the field and erecting the gates was not *per se*, a revocation of the dedication.

1. In the case of a public way, no length of time legalizes the nuisance. And this is true as a private way, unless there be an actual abandonment. The erection of a gate is not conclusive evidence of a prohibition. 2 Greenl., § 664.

2. In the case of a private way. "Slight intermittance in the use, a slight alteration in the mode of enjoyment does not destroy the right. There must be evidence of a disclaimer or intention of abandonment." 2 Greenl., § 665.

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3. A license may be presumed from silence and acquiescence. 1 Saund. Pl. and Ev., 467. 1 Greenl., § 197.

4. Use of a way to establish the right, must be uninterrupted. The word interrupted must be taken to mean "stopped," a cessation or chasm in the use, not a mere disturbance or annoyance.

The defendants insist that they might admit that there was no public road, and no private way, and that the erection of the gates rebutted the presumption of dedication, yet that the jury were warranted in presuming a license, since the gates were erected, having exercised the right of repairing the road for fifteen years since the gates were erected, during which time no revocation or notice was made or given.

BY THE COURT.

There is no evidence in this record showing a *dedication* by the owner, of the *way* in question, to the use of the public; or of any such intention on his part. The proof establishes nothing more than a mere license, or permission, by the owner, to the inhabitants of a local neighborhood, to use the pathway, as a matter of favor and convenience. And such use, being only by sufferance, during the pleasure of the owner, he had the right to put an end to it at any moment.

No use or acceptance, of the way, by the *public*, is shown; nor any recognition of it by the proper authority, the county court.

That a right of way may be claimed by a dedication to the public use, by the owner of the soil, is not



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denied; but, with us, this doctrine must be cautiously admitted. Its too easy application would defeat the right of the owner of the soil, to have compensation for the damages sustained by laying out a road over his land, to which he is entitled, when such road is laid out by the proper authority.

It results, that the occasional use of the pathway in question, through the plaintiff's close, gave the defendants no right to dig or remove the soil for the repair of said way.

The judgment must be reversed, and a new trial awarded.

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JAMES PEARCE vs. THE STATE.

1. DOMICIL. *Residence of a married man's family.* In the legal idea of a domicile, *home, residences and business*, are material elements. That is properly the domicile of a person, where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. The place of residence of a married man's family, though not always his domicile, is nevertheless a fact from which the domicile may be presumed. But this is a presumption of fact and not of law, subject to be removed by proof to the effect that the true domicile is at a different place from that of the family residence.
2. ILLEGAL VOTING. *Indictment.* In an indictment for the offence of illegal voting, a mere averment that the defendant voted in an election held under the constitution and laws of Tennessee, for President and Vice President of the United States, on the day and in the county named, "*he, the defendant not being then and there a qualified voter in said county,*" is not a description of the offence. As there are, under the constitution and laws of Ten-

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nessee, various grounds of disqualification, the precise facts which disqualify the voter must be stated.

3. CRIMINAL LAW. *Same. Essential averments.* Where the act for which a party is indicted, is not in itself unlawful, but becomes so by other facts connected with it, the facts in which the illegality consists, must be set forth and averred.

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FROM RHEA.

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The plaintiff in error was presented by the grand jury of Rhea county at the March Term, 1849, of the circuit court for said county, for illegal voting in the presidential election of 1848. The presentment, after setting out the election, time, venue, &c., is in these words: "That the said defendant did, then and there, unlawfully and knowingly vote at and in said election, he, the said defendant not being then and there a qualified voter of said county, and then and there well knowing he was not a qualified voter in and for said county." At the November Term, 1850, of said court, the plaintiff in error was convicted of said offence, and adjudged to pay a fine. A motion for a new trial, and in arrest of judgment was made and overruled, and an appeal taken to this court. The counsel for the plaintiff in error, Messrs. Smith and Collins, assigned the following reason in arrest of judgment in the court below: "That the indictment does not allege what constitutes the defendant an unqualified voter in the county of Rhea." It appeared in proof that the plaintiff in error came to Rhea county on the fourteenth of March, 1848, leaving his family in the county of Claiborne; that he worked on the farm of one of the witnesses until some time in August of that year, and returned to the county of Campbell to see his family,

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promising to return, which he did in about two months; that he voted in the Presidential election of 7th November, 1848, his family still residing in Campbell; that he had expressed a desire while in Rhea, to remove to that county or to Alabama, but that his wife was unwilling to move. His Honor, Chas. F. Keith, presiding, charged the jury, that, "If, from the proof, they were satisfied that defendant had a family residing in Campbell county, and that he came to Rhea county and engaged to work for a limited time, or a temporary purpose, it would not be a change of his home; his residence would be still in Campbell county. A person can have but one domicile at the same time, and where his family and property is, in legal contemplation is his home, unless a final separation has taken place between him and his family."

HORACE MAYNARD, for plaintiff in error, cited 3 Rosc. Abr., 560; Whart. 78; 1 Meigs, 600; 1 Ch. Cr. Law, 154.

SWAN, Attorney General, for the State.

TOTTEN, J., delivered the opinion of the court.

James Pearce was convicted in the circuit court of Rhea on a presentment for illegal voting. He moved for a new trial, and in arrest, and the motions being severally overruled, he appealed in error to this court.

It is now assigned for error, first, that his Honor, the Circuit Judge, erred in his instructions to the jury.

He instructed the jury in effect, that the place where the defendant's family resided and his property

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is situated, is, "in contemplation of law," to be deemed his domicil, unless in case of a permanent separation from his family. This is not quite correct. *Home, residence* and *business*, are material elements in the legal idea of domicil. Thus, Mr. Kent, "The place where a man carries on his established business or professional occupation, and has a home and permanent residence is his domicil." 2 Kent's Com., 431, note. And so, Mr. Story, "That is properly the domicil of a person where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." Con. Law, § 41.

Now, it is not true that the residence of a married man's family is necessarily to be deemed his domicil. For, beside the supposed case of a separation, there may be a temporary residence only, for the family, or for transient purposes, at a place which is not his permanent residence and home. It is true, that the residence of a married man's family is in general to be deemed his domicil, because they usually reside at his permanent home; the place to which, whenever he is absent for business or pleasure, he has the intention to return. The residence of the family is a fact from which the domicil may be presumed; and this is a presumption of fact, and not of law, as was erroneously stated by the judge. The presumption may be removed by proof to the effect that the true domicil is at a different place from that of the family residence. Story Con. Laws, § 46.

Second: That the presentment is bad, for want of the necessary averments, descriptive of the nature of the offence.

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The presentment avers in substance, that in the election for President and Vice President of the U. States, in 1848, the defendant unlawfully and knowingly voted in the county of Rhea, he, the defendant, "not being a qualified voter in and for said county of Rhea."

The Act of 1844, ch. 31, § 1, provides that if a person vote at any election held under the constitution and laws of this State, "such person not being at the time a *qualified voter* of the county in which he so votes, he shall be adjudged guilty of a misdemeanor.

We think the presentment bad. The *nature* and *cause* of the accusation are not well stated. Cons., art. 1, § 9. The presentment is in the words of the statute; and the words are, "a qualified voter." That is not a fact, but a *legal result*; and for the facts which constitute a qualified voter, we are to refer to the constitution and laws; from which it will be seen that there are several grounds of disqualification: 1st, If he be not a free white man, twenty-one years of age. 2nd, If he be not a citizen. 3rd, If he has not resided in the county six months as a citizen thereof.

Now, for which of these causes was the defendant disqualified? The presentment does not inform him, and the cause can only appear in the proof, when he may be taken by surprise, and be wholly unprepared to make his defense, however just and valid it may be.

The rule is, that "the indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime. A statement of a legal result is bad." 1 Chit. Cr. L., 228. A conclusion of

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law need not be stated; it is the facts upon which it is founded, that are necessary and material. 1 Chit. Cr. L. 231.

We may further observe, that where the act is not, in itself, necessarily unlawful, but becomes so by other facts connected with it, the facts in which the illegality consists, must be set forth and averred. 1 Chit. Cr. L. 229.

Now, the act of voting is not necessarily illegal, but may become so for some of the causes before stated; and in order that the charge may be perfect, such cause must be set forth and averred in the indictment or presentment. The ground of disqualification not being averred in the present case the judgment will be reversed, and the motion in arrest sustained.

Judgment reversed.

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JOHN ROGERS vs. SAMUEL A. WHITE.

1. **TRESPASS QUARE CLAUSUM FREGIT.** *Right of Action. Trustee.* Where real estate is settled by a decree of the chancery court, upon a trustee, for the use and benefit of a *feme covert*, who remains in possession of the premises, such possession of the *cestui que trust*, is the possession of the trustee. Upon his acceptance of the trust, the trustee instantly becomes vested not only with the right of possession, but in legal contemplation with the actual possession also, and may maintain trespass against a wrong doer having no title, although the decree creating said trust, be technically imperfect, and does not vest him with the absolute legal title.
2. **CHANCERY.** *Decree creating Trust. Construction.* Where a trust valid in itself, is created by a decree of the chancery court, so inartificially phrased as to vest no legal title to the realty embraced therein in the trustee; such

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decree should be so construed as to give effect if possible to the purposes of the trust. So where upon a bill filed on behalf of a *feme covert*, to have certain real and personal property settled upon a trustee for the sole use and benefit of herself and children, excluding the marital right of her husband, and the court declare in an interlocutory decree, that "said property ought to be vested in a trustee for the use and benefit of said complainant," and in its final decree, appoints a "trustee, to take charge of the property both real and personal belonging to said complainant," without formally vesting him with the legal title: *Held*, that said trustee, from the very nature and objects of said trust, may maintain all such actions for injuries effecting the real estate placed in his "charge," as requires merely an actual possession for their support, and not a legal title.

3. TRUST. *In Exclusion of the Marital Right. Duration.* Where an estate is settled upon a trustee for the sole use and benefit of a *feme covert* free from the use, control or creditors of the husband, the interest of the trustee continues no longer than the purposes of the trust demand. The object being to protect the property against the marital rights of the husband, upon his death, all the purposes of the trust are accomplished: the wife's rights become absolute in her as before marriage, and the interest of the trustee is at an end.
4. BOUNDARY. *Conventional Line. Parol Evidence.* Where, in defining and proving the boundaries of land — a conventional line is relied upon — title must be shown in the parties to the agreement by which such conventional line is established. Parol evidence of such conventional line is admissible *only*, after legal evidence is adduced that the parties had title to the premises, and therefore a right to make such agreement.

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FROM KNOX.

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The defendant in error, brought his action of trespass *quare clausum fregit* in the circuit court of Knox county, against the plaintiff in error, for alleged injuries done to certain real estate held in trust by the defendant in error, for the use and benefit of Isabella French. The trespass complained of, was cutting and carrying off timber. There was a verdict and judgment in the court below, (HYNDS, J., presiding,) against Rogers for \$17.50, from which he appealed in error to this court. The land upon which the alleged trespass was committed

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had been devised by the will of the late Hugh L. White to his widow, Ann E. White, for and during her natural life, with remainder to Isabella, his daughter. Pending the life estate, Isabella intermarried with W. B. French; and on the 19th of September, 1846, Ann E. White, for a valuable consideration, conveyed her life estate in said land, to Isabella French, "to her sole and separate use, free from the control of her said husband, and from all liability for his debts," in which conveyance was also embraced much valuable personal property. On the 22d of March, 1847, and before said Isabella came into possession of said property, she filed her bill, by her next friend, in the chancery court at Knoxville, restraining her said husband from reducing said property into possession, and praying that the same be settled upon a trustee for the sole and separate use of herself and children to the exclusion of the marital rights of her said husband whose large indebtedness and insolvency were alleged in the bill. On the 14th of April, 1848, there was an interlocutory decree made in the cause, ordering an account to be taken, and declaring, that "all the right, title, and interest of said Isabella, in said property, both real and personal, *ought to be* vested in a trustee, for the use and benefit of said Isabella and her children." The final decree was made on the 25th of December, 1848, in which the court "appoints Samuel A. White a trustee, to *take charge* of the property, both real and personal, belonging to said complainant and children, and vesting the same in said trustee, for the sole and separate use of said Isabella and her children, to the exclusion of all others." Isabella French was then placed in possession of said property—and it was during such posses-



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sion of the land in question, that the trespass was committed, for which Samuel A. White as trustee brought this action. It appeared in proof, that the *locus in quo* of the trespass was not embraced in the apparent true calls of the plaintiffs paper title for course and distance, but *was* within his boundary as defined by a certain *conventional line* long before agreed on between those under whom he claimed, and one Houston; the court below allowed evidence to go to the jury as to the existence of the conventional line; among the title papers also, adduced by White on the trial, was a deed from David Nelson to Hugh L. White, reciting the boundary along the land in question as follows: "Thence north-east with a conventional line agreed upon between said Nelson and Houston, fifty-five poles to a stake in the line of the late William McCampbell's land," but no evidence was adduced showing title in Houston at the time the conventional line was agreed on.

SNEED, TEMPLE, ROGERS & BOYD, for plaintiff in error.

MAYNARD & LYON, for defendant in error.

McKINNEY, J. delivered the opinion of the court.

This is an action of trespass *quare clausum fregit*, for cutting and carrying away certain timber trees. Verdict and judgment were for the plaintiff in the circuit court, and appeal in error by the defendant to this court.

The first point made in the argument here, involves the right of the plaintiff to maintain the action, on the ground of want of title. The facts upon which this

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question is raised, are these: Isabella French, wife of William B. French, was the owner of real estate, slaves, and other personal property, devised and bequeathed to her by her father, Hugh L. White. Her husband being insolvent, she filed her bill, before the reduction of any of the property into her possession—to exclude his marital right, and to have the same, both real and personal, settled to her separate use. The interlocutory decree made in the cause, declares that “all the right, title, and interest of said Isabella French, in and to said property, real and personal, *ought* to be vested in a trustee, for the use and benefit of said Isabella and her children.” But the final decree, in terms, merely constitutes and “appoints Samuel A. White a trustee to *take charge of the property both real and personal belonging to said complainant,*” without formally vesting him with the legal title.

It is argued for the plaintiff in error, that the trustee has no such interest in the real estate, under this decree, as will entitle him to maintain the present action, the absolute legal title being in Isabella French.

The final decree is inartificial, and certainly does not vest the trustee with any legal title, so far as the real estate is concerned. But the decree should be so construed, if possible, as to carry out the purpose of the trust: and upon a proper construction thereof, we think, the trustee is vested with such an interest as is sufficient to entitle him to maintain the present suit.

The authority to “take charge” of the property, real and personal of the *feme covert*, is unquestionably a full authority to take the property into his immediate and actual possession, and to hold the possession in subservi-

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ence to the purposes of the trust. Upon his acceptance of the trust, the trustee instantly became vested not only with the right of possession, but, in legal contemplation, with the actual possession also; for although the *feme covert* may have remained in the occupation of the premises, still the possession, in law, was the possession of the trustee. And possession of part being possession of all the land embraced within the proper boundaries of the deed or grant, and actual possession being sufficient to support trespass against a wrong doer, having no title, it follows that the objection, upon this ground, cannot avail the plaintiff in error. If this were not so, then no action at law could be maintained by any one for the alleged trespass. By the decree, the interest of the husband is excluded; therefore he can maintain no action, either separately or jointly with his wife; nor can the wife sue in her own name, because of her coverture. Of necessity, therefore, from the very nature and objects of the trust, it would seem to result, that the trustee may at least maintain all such actions, for injuries affecting the real estate placed in his "charge," as require not a legal title, but merely an actual possession for their support. How it be in respect to actions founded upon legal title, is a question which, upon the facts in this record, we are not called upon to decide.

From the nature of this particular trust it follows, of course, that the interest of the trustee continues no longer than the purposes of its creation demand. The object being to protect the property against the marital rights of the husband, upon his death all the purpose of the trust are accomplished; the wife's right becomes absolute in her, as before the marriage; and the interest

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of the trustee is at an end. But the record being silent as to whether the husband be living or dead, we must take it, for the present, that he is still alive, upon the legal presumption in favor of the continuance of life until the contrary is shown; though, as alleged, the fact be otherwise.

2. It is argued that the court erred in admitting evidence to the jury of the supposed conventional line alleged to have been made between Hugh L. White (or those under whom he derived title) and Robert Houston. This objection we think is well founded. The plaintiff in the action seeks to depart from the *apparent* true calls of his title deeds for course and distance, and to recover for an alleged trespass to land, which *prima facie*, is not embraced by the calls thereof; and this by force merely of a conventional line, said to have been agreed upon and established between those under whom he claims, and Houston. Without noticing other objections not urged in the argument here, we place our decision upon the ground, that, if such conventional line were in fact made, it is not shown by any competent evidence that Houston, at the time, had any title to, or interest in the adjoining land, between which and the land of White, the supposed conventional line was to form the boundary; and without such title or interest, he could make no compact or agreement in respect to the boundary, binding on White or any other person. 9 Humph., 75.

The effect of the testimony excepted to is, to establish a title in Houston by parol evidence, and clearly this is not allowable.

The plaintiff's recovery cannot be supported upon the ground, that the plaintiff's possession was commensurate

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Geo. W. Deathridge vs. The State.

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with the limits of his paper title, and that for a long period the conventional line in question had been claimed and recognized as the boundary. His legal possession of the wild, unenclosed portion of his tract of land, was limited by the true boundaries of his title papers. Here the proper boundary is the very point in dispute; and without the establishment of the conventional line claimed by the plaintiff, it would seem from the aspect in which the case is presented in this record, that the *locus in quo* is not covered by his title.

The judgment must be reversed, and a new trial awarded.

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GEO. W. DEATHRIDGE vs. THE STATE.

1. CRIMINAL LAW. *Evidence. Confessions of guilt.* Great weight and credit are justly due to confessions of guilt, when they appear to proceed merely from a sense of guilt, and not from the influence of hope or fear in any degree; for we are to presume, in the absence of *influence* and *motive*, a person who is innocent of crime will not confess himself guilty. But a confession which is the result of hope or fear, excited in the prisoner by one having power over him, is incompetent, as it can have no tendency to establish the guilt of the prisoner. A person not of strong character, overawed and subdued by a criminal charge, involving the ruin of himself and all dependent upon him, may, under influence, confess himself guilty when he is innocent.
2. EXTORTED CONFESSIONS. *Presumption of law.* When a prisoner has once confessed himself guilty of a crime under the influence of hope or fear, any confessions he may thereafter make, will be presumed to have been made under the same influences, unless the contrary be shown. The *onus* in this respect, rests upon the State.

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Geo. W. Deathridge vs. The State.

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3. **EVIDENCE. *Accusation and denial.*** Where a prisoner is accused of crime and remains silent under the charge, such fact may go to the jury as a circumstance for such inference as it may reasonably warrant. But if the prisoner deny the accusation, such denial reduces it to a mere charge, and it is error to allow it to go to the jury.
4. **CONFESSIONS IMPROPERLY OBTAINED. *Other facts discovered by.*** It is a rule of law, that where important facts are discovered in consequence of the confessions of a prisoner improperly obtained, so much of said confession as strictly relates to the fact discovered by it, may be given in evidence, and it becomes competent only from the fact that its truth is verified by the discovery.

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FROM MEIGS.

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The plaintiff was indicted in the circuit court of Meigs county for the crime of arson. After several ineffectual efforts to get a jury in Meigs, the venue was changed to the county of Hamilton. At the November Term, 1852, of the circuit court of Hamilton, (Keith, J., presiding,) the plaintiff in error was tried, convicted, and sentenced to the penitentiary for nine years. His motion for a new trial, and in arrest of judgment, were made and severally overruled, and he appealed in error to this court. The chief ground of error assigned, was, that the prisoner was convicted on his own confessions, which were improperly obtained. The manner and matter of the objectionable confessions are sufficiently stated in the opinion.

SWAN, Attorney General for the State, cited, 2 Russ. Cr. 861, 2, 3. *Hudson vs. The State*, 9 Yerg., 408-410. *Rex vs. Bryan*, 3 C. C. 157. Griffin's case, 1 C. C., 492.

TREWHITT, for the prisoner, cited, 1 Greenl. Ev., § 219, 233, 231, 232. 2 Russ. Cr. 826, 239, 827, 832, 229, 862, 863. 2 Humph. R., p. 37.

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Geo. W. Deathridge vs. The State.

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TOTTEN, J., delivered the opinion of the court.

The prisoner was convicted in the circuit court of Hamilton upon a charge of arson. His motion for a new trial was overruled, to which he excepted, and has appealed in error to this court.

The indictment charges in substance, that the prisoner and Philip Wilson, and Geo. Gideon, unlawfully, feloniously and maliciously set on fire a store house, containing \$3,000 worth of goods, and that the whole was consumed.

We are to consider the case as it relates to the prisoner Deathridge.

The errors assigned, relate to the ruling of the court below upon questions of evidence.

The prisoner was arrested by Brown, the prosecutor, aided and assisted by Prior Neal and others, who were with him for that purpose. They brought him to a place designated as the "gate post," thence to "pin hook," and thence to "ten mile." At each of these places confessions were made by the prisoner, and they have been given in evidence against him.

The prosecutor attempted to strike the prisoner with a rock, but was prevented by Neal, who took the prisoner under his protection. Neal then said to the prisoner: "I have saved you from Brown; you have been telling us lies; you are guilty, and the best policy is to retract, and tell all about it. If you do not, I cannot save you any longer." They were standing by the "gate post;" Brown came up; "it was said to the prisoner, it was best to turn State's witness, and get out of it." The prisoner then said:

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"Gideon and Wilson come to me the night the house was burnt, and wished me to go with them on a frolic. At first I refused, but at length did go with them to a log heap about a mile from the store house. I remained there 'til Gideon and Wilson returned. They brought to me a bundle of goods. I do not know exactly where the goods are, but will tell you as near as I can."

The party then went with prisoner to the top of a ridge; the prisoner then pointed to a place where the goods would be found. They went according to his directions, found the goods, and the same were identified by marks and otherwise, as the goods of the prosecutor.

The prisoner was then taken to "ten mile," and there being confronted with Gideon and Wilson, they mutually criminated each other, both as to the arson and the larceny.

Gideon and Wilson said that "prisoner was equally guilty with them; that he had sent for them saying, 'a good haul could be made.'" This, the prisoner denied.

The counsel for the prisoner objected to the evidence, but the same was permitted to go to the jury.

1st. There can be no question but that the evidence was incompetent.

If a confession be free and voluntary; if it appear to proceed merely from a sense of guilt, and not from the influence of hope or fear in any degree, it is competent evidence. Great weight and credit are justly due to a confession of this kind; for we are to presume in the absence of *influence and motive*, a person



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who is innocent of crime will not confess himself guilty. But if the confession be the result of hope or fear, induced or excited by a person having power over the prisoner, it becomes incompetent; for, in such case, it can have no tendency to prove that the prisoner is guilty of the crime. A person not of strong character, overawed and subdued by a criminal charge, involving the ruin of himself and all dependent upon him, may, under *influence*, confess himself guilty, when in fact he is innocent.

The law, having regard to its own justice, and the weakness of human character, will exclude any such confession, and permit a confession only when it is of the kind stated. Such is the rule and the reason of the rule on this subject.

Now, to illustrate the rule: If it be said to a prisoner, "it will be better for you, if you do confess," or, "worse for you if you do not confess," or the like, a confession thereon made will be inadmissible as evidence. 2 East., 659; 2 Russel on Cr., 645.

In the present case the prosecutor attempted violence on the person of the prisoner, because he was telling lies by denying his guilt. Neal, who had the prisoner in his immediate custody, charges him with the crime, and advises him, as the better policy, to retract his denial, and confess. A stronger appeal to both the hopes and fears of the prisoner, could scarcely ever be made.

Besides, the prisoner confessed under the belief that he was to be used as a witness against his accomplices, and thereby escape any punishment for the crime. This, in itself, is a fatal objection to the confession.

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2nd. We may observe in the next place, that any confession thereafter made, under the same influences, is liable to the same objection; and it will be presumed that the same influences continued, until the contrary be made to appear. The *onus*, in this respect, rests upon the State.

3rd. We have seen that Gideon and Wilson accused the prisoner, in his presence, saying that he had sent for them, and advised them that "a good haul could be made." This charge, the prisoner denied; yet it was permitted to go in evidence against him. This was error. If the prisoner had remained silent under the charge, it was competent to go to the jury, as a circumstance, for such inference as the facts attending it might reasonably warrant. But the denial reduced it to a mere charge; and certainly that is no evidence of guilt. If it were so, who could escape, however innocent. *Hendrick vs. The State*, 9 Humph. R., 728.

4th. Conceding that the confessions were improperly obtained, yet they led to the discovery of goods, supposed to be taken from the store when it was on fire.

On this subject, the rule is, that so much of the confession as relates *strictly to the fact discovered by it*, may be given in evidence; for the reason of rejecting extorted confessions, is the apprehension, that the prisoner may have been induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true. Russell on Cr., 651.

It was competent to prove that the prisoner stated or pointed out the place where the goods might be found, and that the goods were found at the place

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indicated by him. That is all of the confession, in such case, that is competent; and it becomes so only from the fact, that its truth is verified by the discovery of the goods. But if the prisoner had stated at the same time, that he had taken the goods from the burning house, and put them there, that would be incompetent as evidence; it being part of the extorted or improper confession before alluded to. Certainly, the fact that the prisoner knew where a portion of the goods were deposited, if unexplained, is a strong circumstance against him, from which inferences may be drawn; but it is not to be aided by the admission, in any degree, of extorted and illegal confessions.

The judgment is reversed, and a new trial granted to the prisoner. He will be remanded to the court below for that purpose.

Judgment reversed.

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JOSEPH HAMILTON vs. JACK & McCALLISTER.

**EJECTMENT. Sheriff's Deed. Possession of defendant. When a presumption of title.** Where a plaintiff in ejectment relies upon a sheriff's deed, founded upon a judgment and execution against the execution debtor in possession, under which a sale was properly made, he must show that the defendant was in the actual possession of the land sued for at the time of the levy and sale. 3 Humph., 129. Ib., 16. 8 Humph., 689.

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FROM JEFFERSON.

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This action of ejectment was brought by Jack and McCallister, in the circuit court of Jefferson county,

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against Hamilton. The plaintiffs claimed under a sheriff's deed founded upon a judgment and execution against Hamilton, which was levied upon the land in the possession of Hamilton, which was sold, at which sale Jack and McCallister became the purchasers. At the December Term, 1852, there was verdict for plaintiffs, and writ of possession awarded. The defendant moved for a new trial, which being refused, he appealed in error to this court. The error assigned is stated in the opinion.

CROZIER, for plaintiff in error.

CASWELL and SWANN, for defendants in error.

BY THE COURT.

The jury were instructed by the court below, "that a sheriff's deed, founded upon judgment and execution, under which a sale was properly made, would entitle the plaintiff to recover, if the proof shows that the defendant Hamilton was in actual possession of the land sued for, *at the commencement* of the present action."

This instruction is erroneous. The cases referred to establish the principle, that in such case it must be shown, that the defendant was in possession *at the time of the levy and sale*. From the fact of possession by the defendant in the execution *at the time of the levy*, the presumption of legal title in him to the land levied upon and sold is founded. But no such presumption can arise from the mere fact of his being in possession at the commencement of the action of ejectment for the recovery of the land sold.

Let the judgment be reversed.

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James T. Gardenhire vs. Sheldrake McCombs *et al.*

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JAMES T. GARDENHIRE vs. SHELDRAKE MCCOMBS *et al.*

1. **STATUTE. Retrospective law.** A retrospective law, in the proper sense of the constitution, is a law impairing the obligation of contracts or disturbing vested rights; and this doctrine is understood to have no application to laws which merely regulate the *remedy* or mode of procedure, as contradistinguished from the *right*.
2. **COSTS IN CIVIL CASES. Act of 1852, ch. 146. Practice. Construction.** The act of 1852, ch. 146, repeals the act of 1811, ch. 91, and provides "that in all suits for the recovery of damages occasioned by the overflowing of water, by the erection and keeping a grist-mill, saw-mill or other water-works, the successful party shall be entitled to full costs as provided in the act of 1794, ch. 1, § 74;" with the *proviso*, "that if the judgment for damages does not exceed five dollars, the plaintiff shall not recover more costs than damages;" but makes no provision as to the residue of costs in cases contemplated by the *proviso*: *Held*, that the proper practice in reference to the residue of the costs in cases contemplated by said *proviso*, is to give judgment against each party for his own proper costs; and that the act of 1852, ch. 146, embraces within its provisions, all judgments rendered in this species of action after said act took effect, irrespective of whether the suit commenced before or after its passage.

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FROM HAMILTON.

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This cause originated before a justice of the peace in Hamilton, upon a warrant in favor of James T. Gardenhire against Sheldrake McCombs and William McCombs, for erecting and keeping up a mill dam for a water grist-mill, by which the plaintiff's land was overflowed and damaged. The warrant was issued on the 12th day of February, 1850, upon which there was a judgment on the 9th of March following, in favor of the plaintiff, for eight dollars damages, and thirteen dollars and fifty cents costs. The defendants brought the cause by *certiorari* into the circuit court of Hamilton county, where at the November Term, 1851, the

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death of William McCombs was suggested, and the suit revived at the succeeding term against John McCombs, his administrator. The cause was continued from term to term, until it was finally tried at the March Term, 1853, before Hon. C. F. Keith, Judge, when there was verdict and judgment for the plaintiff for one dollar damages and one dollar costs, and a judgment against the plaintiff for the balance of the costs. The plaintiff's counsel moved the Court to change the entry of the judgment, and render the same in conformity to section one of the act of 1852, ch. 149, upon the ground that said act is a repeal of the act of 1811, ch. 91, which was overruled on the ground that the suit was instituted before the passage of the act of 1852, ch. 146; whereupon the plaintiff appealed in error to this court.

GAUT and MINNIS, for Gardenhire.

TREWHITT and ROWLES, for Sheldrake and John McCombs.

McKINNEY, J., delivered the opinion of the court.

This suit was commenced before a justice of the peace, on the 12th of February, 1850, to recover damages for overflowing the plaintiff's land, by the erection and keeping up of a grist-mill.

The plaintiff had judgment before the justice, and the case was removed into the circuit court of Hamilton by *certiorari*. At the March Term, 1853, there was a trial, and the jury found a verdict in favor of the plaintiff for one dollar damages. The court thereupon rendered

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judgment in favor of the plaintiff for the damages found, and for an equal amount of cost; and for the balance of the costs judgment was given against the plaintiff; from which he appealed in error to this court.

We think this judgment is erroneous. At the time this suit was commenced, the existing law prescribing the rule as to costs in such cases, (act of 1811, ch. 91,) provided by the first section, that "the plaintiff shall, in no instance, recover of the defendant a greater sum in cost, than may be assessed by the jury in damages;" and the second section made it the duty of the court "to pronounce judgment against the defendant for as much cost as there may be damages assessed; and at the same time to pronounce judgment against the plaintiff for the residue of said cost."

Pending this suit, the Legislature, by the act of 1851-2, (passed on the 24th of Feb., 1852,) enacted, "That the first and second sections of the act of 1811, ch. 91, be, and the same are hereby repealed; and in all suits for the recovery of damages occasioned by the overflowing of water, the successful party shall be entitled to full costs, as provided in the 74th section of the act of 1794, ch. 1. *Provided*, That, if said judgment for damages does not exceed five dollars, the plaintiff shall not recover more costs than damages."

This act prescribes a new rule as to costs in this particular action. There is nothing in the act restricting its operation to cases arising after its passage; on the contrary, it is alike applicable in its terms, to all judgments rendered in this species of action, after the law took effect, irrespective of whether the suit may have been commenced before or after the passage of the act.

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Such is the plain meaning and construction of the law; and upon this construction, the doctrine that a statute is not to have retrospective effect, is not applicable. It has been long settled in this State, and was reaffirmed at the last term of this court at Nashville, that a retrospective law, in the proper meaning of our constitution, is a law impairing the obligation of a contract, or disturbing vested rights. This doctrine is understood to have no application to laws which merely regulate the *remedy*, or mode of procedure, as contradistinguished from the *right*; and of this character is the act of 1852.

The case being governed by the latter act, it only remains to enquire what judgment is proper, if any, so far as respects the residue of the costs. We have seen, that by the repealed statute of 1811, the plaintiff could, in no instance, recover more costs than the amount of damages awarded to him by the jury; and that, for the remaining costs he was liable to judgment. This rule, which was deemed harsh and oppressive in frequent instances, is abolished by the act of 1852; and this class of cases is placed within the operation of the general law of 1794, giving to the successful party full costs, with the single exception, that if the plaintiff's recovery does not exceed five dollars, he shall not recover more costs than damages. But, as to how the residue of the costs are to be recovered, or from whom, the act is silent; and in this view we are called upon to give a construction to the law. It is very clear that the plaintiff cannot be subjected to a judgment for the entire balance of costs, as under the act of 1811. To relieve him from this seems to have been a principal object of the act of 1852.



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We think the intention is sufficiently manifest, to leave each party liable for his own proper costs, except as to an amount of costs equal to the damages recovered, for which, by the *proviso*, the plaintiff is entitled to judgment. And we think the proper practice to establish, is, to render judgment, as respects the residue of the costs, against the parties respectively.

The judgment will be reversed as to costs, and entered up in conformity with the principle herein laid down.

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PETER F. GENTRY, *et al.* vs. JAMES O. GENTRY, *et al.*

1. TENANTS IN COMMON. *Right of Redemption. Possession.* When an equity of redemption descends to several as tenants in common, each one has a right to redeem, or to bring suit to enforce the equity on behalf of the others, without express authority. The act of one is the act of all, in any legal proceeding necessary to secure the title and possession, and the law in such case implies an authority in each to act for the others. So if one makes a tender which is accepted, and the party put in possession, it would be the possession of all the tenants in common.
2. CHANCERY. *Answer. Construction. Waiver.* Where one of several to whom an equity of redemption has descended, as tenants in common, refuses to join in a bill filed by his co-heir, to enforce the equity, but answers said bill, assigning his reason for not so joining to be, that he feared the proceeding might fail and costs be incurred, and stating further that he questioned the validity of the tender made by the complainant; referring the matter to the chancellor to determine, and that he preferred that the title should remain in the purchaser who is more needy, rather than go to the

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party making the tender: *Held*, that this language does not amount to a waiver or relinquishment of his interest in the land as one of the heirs.

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FROM KNOX.

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On the 11th of October, 1847, a tract of land lying in Knox county, belonging to Wm. E. Gentry, was sold at sheriff's sale under an execution founded on a judgment against said Gentry, and was purchased by Sarah S. Gentry: soon after which, Wm. E. Gentry died intestate, unmarried, and without issue, leaving brothers and sisters his heirs at law. Within the time allowed to redeem, James O. Gentry, one of the heirs, offered to redeem the land, and tendered to the purchaser the redemption money for that purpose, which was refused. He thereupon filed this bill in chancery at Knoxville, to enforce the equity of redemption. The chancellor, (Hon. THOS. L. WILLIAMS,) made a decree, enforcing the equity in behalf of all the heirs except Peter F. Gentry, whose interest was decreed to the purchaser for the reasons stated in the opinion; whereupon, Peter F. Gentry prosecutes a writ of error to this court.

W. H. SNEED, for complainant.

HORACE MAYNARD, for respondent.

TOTTEN, J., delivered the opinion of the court.

This bill is brought to enforce an equity of redemption in land, sold under execution, as the property of Wm. E. Gentry, a judgment debtor; at which sale Sarah S. Gentry became the purchaser. After the sale,

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the debtor died intestate, leaving brothers and sisters his heirs at law, to whom the equity of redemption descended. Within the two years allowed to redeem, James O. Gentry, for himself and the other heirs tendered the true amount for the redemption of the land to the purchaser, which was refused. The decree of the chancellor enforces the equity of redemption in favor of all the heirs except Peter F. Gentry, who is one of them; and the interest claimed by him is in terms decreed to the purchaser upon the assumed ground that it was not legally redeemed, and further, that Peter F. Gentry had relinquished and surrendered his supposed interest in and by his answer to the bill in the present case. To this he objects, and has prosecuted a writ of error to this court.

1. When James O. Gentry made the tender to redeem the land, it is clear that he had no *express* authority from Peter F. Gentry to redeem for him. This is fully admitted by his answer.

But these parties being tenants in common of an equity of redemption, had a common interest in such proceeding as was necessary to secure and perfect their title to the land. No previous *express* authority was necessary to make the tender valid for all. The agency is *implied* by the law, from the relation in which the parties stand in reference to the right in question. It was competent for each to act for all in making the tender, it being a proper and a legal act to secure a title and possession in which they held a common interest. If the tender had been accepted, and the party making it let into possession, it would have been the possession of all the tenants in common. 4 Kent, 370.

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Because the redemption made by one of the tenants for the benefit of himself and the others, must be considered valid as to all, we conclude therefore that the tender was valid as to all the tenants in common, and each of them may insist upon it, in a bill to enforce the equity of redemption.

2. It is argued that Peter F. Gentry, who is in the position of a defendant, has *waived* and relinquished his right in and by his answer to the bill.

The answer is certainly ambiguous, but we do not construe it as contended for by counsel. Respondent states in substance, that James O. Gentry was not his agent to redeem; he believed that the administrator of the intestate, was the proper person to redeem; he was not willing to join in the suit, being apprehensive that it would fail and costs be incurred, he refers it to the chancellor to determine whether the tender was valid; and prefers that the title remain in the purchaser, who is more needy, rather than go to James O. Gentry, who made the tender. Such is the purport of a vague and unmeaning answer.

Now we have seen, that there was an *implied* agency to make the tender, and the matter being referred to the chancellor, he must so determine. His refusal to join in the suit, or his position in the suit is of no consequence. He is a necessary party, and his objection is not because he had waived his right, but for fear of costs. Nor is the expression of a mere preference as to which of the parties named, shall take his interest of any effect, as he does not *give* his interest to either, and evidently prefers to retain it himself. This we are compelled to permit him to do, until he thinks proper to

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relinquish it in terms less doubtful than those used in the present case.

The decree of the chancellor will be modified, so as to give Peter F. Gentry his proper interest in the land; but considering the character of his answer, he will pay half the costs in this court, the other half to be paid by the purchaser.

Decree modified.

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SIDNEY, a man of color, vs. THOMAS & NEWTON WHITE.

1. FUGITIVE SLAVES. *Act of Congress. Character of the remedy intended.* The provision of the Federal constitution and the act of Congress passed in pursuance thereof in 1793, for the extradition of fugitives from labor, escaping from one State into another, contemplate a summary proceeding of a ministerial character, and not a judicial trial according to the course of the common law. On establishing a *prima facie* claim of ownership, the claimant is entitled to have the fugitive delivered up to him; leaving the question of right to be decided, in the appropriate form of proceeding, in the proper tribunal.
2. JURISDICTION OF STATE COURTS. *When fugitive delivered to claimant under act of Congress of 1793.* When a proceeding, regular in form, has been instituted under the act of Congress of 1793, in the Federal court, to recover a fugitive from labor escaping into this, from another State, and said fugitive has, by the order of said court, been delivered up to the claimant, with the certificate required by said act, the judicial tribunals of this State have no jurisdiction to entertain a suit for the purpose of trying the right of said fugitive to freedom.
3. PLEADING. *Suit for freedom. Demurrer.* Where a suit was instituted in this State, by a man of color, to recover his freedom, against parties who claimed him as a fugitive slave from another State, and the defendants, after issue joined on the plea of not guilty, plead specially that the

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plaintiff had been taken by them prior to the institution of his suit in a proceeding regular in form, under the act of Congress of 1793, before a Judge of the United States Court, by whom they had been adjudged entitled to the possession of said plaintiff as a fugitive slave, and that they had received from said Judge a certificate to that effect, as required under said act of Congress; to which plea the plaintiff replied that such proceeding was *ex parte* and in fraud of his rights: *Held*, that said plea goes to the entire cause of action alleged in the declaration, and being valid, is a bar to the action, and the replication was demurrable; and upon a *demurrer* to such replication final judgment in favor of defendant was proper.

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FROM KNOX.

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Sidney, a man of color, instituted this suit in the circuit court of Knox county, at the February Term, 1849, to recover his freedom. Prior to the institution of this suit he had been arrested by the defendants as a fugitive slave from the State of Alabama, and taken before the Judge of the Federal court for the Eastern district of Tennessee, who, upon investigating their claim, ordered him to be delivered up under the act of Congress of 1793, to the defendants, who claimed him as agents for the owner in Alabama. This fact was specially plead by the defendants in bar of the action; to which the plaintiff replied that the proceeding before the Federal Judge was *ex parte* and in fraud of his rights. To this replication the defendants demurred, which being sustained by the court below, with final judgment that the defendants go hence, &c., the plaintiff appealed to this court.

LYON, SWAN and CROZIER, for plaintiff.

SNEED and WELCKER, for defendants.

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Sidney, *a man of color. vs. Thomas & Newton White.*

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McKINNEY, J., delivered the opinion of the court.

The plaintiff brought this action for the purpose of establishing his right to freedom. And it is clear, upon the facts in this record, that he was *freeborn*, according to the uniform course of decision in this State. But, in the view in which we are to consider the case at present, the question of the right of freedom need not be discussed.

The only question properly presented for our determination upon this record, is that arising on the demurrer to the replication to the amended plea of the defendants. The circuit court sustained the demurrer, and gave judgment that the defendant go hence, &c.; and in this we think there is no error.

The plea sets up and relies upon, in bar of the action, a proceeding regular in form, under the act of Congress of 1793, before the Judge of the Federal court for the district of East Tennessee, prior to the institution of the present action, in which a *certificate* was given by the Judge, in conformity with the act referred to, authorizing the removal of the plaintiff to the State of Alabama, where he had runaway from the service of the alleged owner.

The act of 1793, in express terms, declares that the certificate of the judge or magistrate "shall be sufficient warrant for removing the fugitive from labor, to the State or territory from which he or she fled." This law is obligatory upon the States; and it follows of necessity, that the judicial tribunals of the State in which the fugitive may be found, have no jurisdiction to entertain a suit for the purpose of trying his right to

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freedom, after the delivery of the fugitive to the claimant under the act of Congress. The provision of the Federal constitution, and the act of Congress passed in pursuance thereof, for the arrest and return of fugitives from labor, intend only a summary proceeding of a ministerial character; and not a judicial trial according to the course of the common law. On establishing a *prima facie* claim of ownership, the claimant is entitled to have the fugitive delivered up to him; leaving the question of right to be decided, in the appropriate form of proceeding in the proper tribunal.

The plea in this case goes to the entire cause of action alleged in the declaration; and being valid, is a bar to the action. The court, therefore, did not err in giving judgment on the demurrer, that the defendants go hence, &c., notwithstanding the issue joined on the plea of not guilty.

Judgment affirmed.

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BENJAMIN A. DAVIS vs. E. T. & GA. R. R. Co.

1. RIGHT OF WAY. *Damages. Railroad built through vacant land. Liability of Company to subsequent enterer.* Where the legislature grants a charter to a Railroad company, authorizing the construction of their road through vacant and unappropriated lands of the State, and said charter is accepted, and the company locate and construct their road accordingly; any subsequent enterer of said land, becomes invested with the ultimate fee simple interest in the soil, *subject to the right of way*, so granted to the company,



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and is not entitled to damages for any injury which said land may have sustained, by reason of the construction of said road within the bounds so granted by the charter. The charter in such case is an absolute and unqualified grant of the right of way, founded upon the consideration of benefit to the public, and the enhanced value of the adjacent lands.

2. **EASEMENT.** *As contradistinguished from the right of soil. Charter. Construction.* A mere easement is separable and distinct from the right of soil. The one may be granted without the other, and may exist in different persons at the same time. A charter granted by legislative act to an individual or a company, is a contract, is a grant; and when accepted and acted upon, becomes as obligatory, as inviolable and as irrevocable as the contract or grant of an individual, and subject to the same rules of construction.

3. **RIGHT OF ENTRY.** *Charter. Condition.* Where the legislature by charter authorizes a company to build a railroad through certain vacant lands, and in said charter, grants to the company the exclusive right up to a limited time, to enter said lands along said road within certain limits, when the same should become subject to entry: *Held*, that such right of acquisition of the *fee*, is not in the nature of a condition either precedent or subsequent, to the other privileges vested by the charter; and a failure of the company to enter the land, cannot affect other rights granted by the charter, altogether independent of the right of soil.

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FROM BRADLEY.

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The plaintiff filed his petition in the circuit court of Bradley county, at the January Term, 1851, of said court, after due notice to the President of the East Tennessee and Georgia Railroad Company, praying the appointment of commissioners to assess the damages he had sustained in consequence of said company having located and constructed their road through his lands. The merits of the controversy sufficiently appear in the opinion. The circuit court, (GOODALL, Judge presiding,) dismissed the petition at the September Term of said court, and the plaintiff appealed in error to this court.

TREWHITT, for plaintiff.

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GAUT & LYON, for defendants.

McKINNEY, J., delivered the opinion of the court.

In 1834, a charter was granted to the defendant, by the General Assembly authorizing the construction of a railroad from Knoxville, "through the Hiwassee district, to a point on the southern boundary of Tennessee." The charter confers on the company the right to take, without the consent of the owners, so much land for the bed of the road and other necessary purposes—not exceeding two hundred feet in width—as the Board of Directors may deem necessary. The charter further provides, that when it shall become necessary to subject the land of individuals for the use of the road, if the right of soil cannot be had by gift or purchase from the owner of the land, and the parties cannot agree as to the value of the land taken, either party may apply to the circuit court of the county where the land lies, for the appointment of five commissioners to assess the value, &c.

The route of said road, as contemplated by the charter, to a considerable extent, lay through a section of country (now known as the Ocoee district) to which the Indian title had been then recently extinguished by treaty, and which, at the date of the charter, was wholly unappropriated, and so remained until 1837, when a law was passed establishing an entry-taker's office, which was opened in November, 1838. The 17th section of the charter provides: "That should said railroad pass over vacant and unappropriated lands, said company shall have exclusive right of entering the land over which

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said road may be laid out, not exceeding two hundred feet in breadth, until the first day of January, 1839. And the entry-taker of the district or county through which said road may be laid out, shall not receive any entry within that period, for the benefit of any other person or persons than said company, under the penalty of five thousand dollars, to be recovered by action of debt, in any court having cognizance thereof, at the suit of said corporation: *Provided*, said company shall notify the entry-taker of the different counties, through which the said road may pass, of the route thereof."

The company proceeded, under said charter, and caused the route of the road to be surveyed and located, and also caused the same to be laid down upon the books of the entry-taker of the district; and in part had graded the road long before the date of the entry, under which the plaintiff claims; to be hereafter mentioned.

The company declined to enter the vacant land over which this road had been laid out; and on the 6th of December, 1841, after the price had been reduced, by operation of the law graduating the price of said land, the persons under whom the plaintiff claims, as general enterers, made an entry of 80 acres of land through which the road had long previously been located: on the 12th of January, 1842, a grant issued to them for the same; and on the 6th of January, 1851, they sold and conveyed said land to the plaintiff.

Upon this state of facts, the plaintiff at the January Term, 1841, of the circuit court of Bradley—before he had acquired any legal title—presented his petition for the appointment of commissioners, to assess the value of so much of the land covered by said entry and grant of

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eighty acres, as had been taken by the company for the use of said road.

The court dismissed the petition and we think properly. We are aware of no principle upon which the claim set up by the plaintiff can be maintained.

It is argued, that a *gift* of the right of soil, in the vacant land appropriated by the company to the use of the road, was not contemplated by the legislature; that it was intended that the company should enter and pay for the land taken, as individual enterers were required to do, and that failing to enter within the time limited, the land was thrown into market, and that as by law, the general enterer was not permitted to take merely the fractions on either side of the road, but was compelled to include in his entry the land occupied by the bed of the road, it follows, that the fee simple in the land appropriated by the company passed to the enterer; that he succeeds to all the rights of the grantor; and, *by relation*, occupies the attitude of owner in fee at the time the land was taken by the company; and, therefore, he is brought within the provisions of § 15th and 16th of the charter, upon which his petition is based. This reasoning, however plausible, is not sound. It is to be observed, that the right of way or easement, is seperable and distinct from the right of soil. The one may be granted without the other, and may exist in different persons at the same time. A charter granted by legislative act, to a private individual or company, is a contract; it is a grant; and, when accepted and acted on, is as obligatory, as inviolable, and as irrevocable, as the contract or grant of an individual, and subject to the same rules of construction. The charter, it is true, does

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not assume to vest the company with any interest in the soil, in the vacant and unappropriated land through which the road was to be laid out; it simply secures to the company for a limited time, the right to acquire the fee in preference to all others. But, although it entitles the company to acquire the absolute legal title to the land appropriated, it does not imperatively require that this shall be done. The right of acquisition of the fee, is not in the nature of a condition, either precedent or subsequent; it is rather an election given to the company, which they may exercise or not, and the failure of the company to enter the land can have no influence upon other rights conferred absolutely by the charter, altogether independent of the right of soil.

The charter is to have such construction and effect—with a view to carry out its contemplated object—as consistently with established rules of law, may be given to it.

It is clear that although the charter does not give the right of soil, it nevertheless confers certain absolute powers, rights and privileges, upon the faith of which it was accepted.

It authorizes the board of directors to enter on the land, and in express terms vests them “with all the powers and rights necessary for the building, constructing, and keeping in repair a railroad from Knoxville, through the Hiwassee district, to a point on the southern boundary of Tennessee.” The title being in the State, there is no question as to the competency of the legislature to make such a grant to the company; and there is as little question, that such grant is not only operative to vest in the company the powers, rights, and privileges

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conferred, but that, upon a well established principle, it amounts to an extinguishment of the right of the grantor, and implies a contract on the part of the legislature, that the rights and privileges so granted, shall be enjoyed by the grantee, and that the State shall not reassert them. This being so, the person who subsequently entered the land, appropriated to the use of the road, became invested with the ultimate fee simple interest, subject to the right of way previously granted to the company and with nothing more. He can have no other or higher right than that derived from his grantor, and we are at a loss to perceive how even the sovereign power of the State could have compelled the company, after the acceptance of the charter, and location and construction of the road, to have entered or paid for the land in question. But be this as it may, it is sufficient for the decision of this case, that the charter, in legal construction, is an absolute and unqualified grant of the right of way, founded upon the consideration of benefit to the public, and the enhanced value of the adjacent lands, and having been accepted and acted on, no such claim can be asserted as is set up by the plaintiff in this case. Without noticing other grounds relied upon by the defendant, we affirm the judgment.

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Joseph H. Delap *et al.* vs. John H. Hunter *et al.*

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JOSEPH H. DELAP *et al.* vs. JOHN H. HUNTER *et al.*

1. PRACTICE. *Appeal and writ of error. Chancery. Act of 1835, ch. 3, § 17.* It is the settled law of this State, that no appeal or writ of error lies from any interlocutory decree, except in the single case provided for in § 17 of the act of 1835, ch. 3, by which the court of Chancery has discretion to allow an *appeal* after an account is ordered and before the same is taken, where by such decree the principles involved in the case are determined. The right to appeal or to prosecute a writ of error, in all other cases, depends upon the *finality* of the decree. So, where by a decree, the rights of all the parties litigant but one, were definitely *settled*, but no disposition made of the costs; and an account ordered as to the party excepted, with the subject matter of which account the other parties had no connection: *Held*, that this was no such final determination of the cause, as would authorize its removal by writ of error to the Supreme court.
2. DECREE. *What is an interlocutory, and what a final decree.* A decree is interlocutory when it is made in the progress of a cause, referring certain matters of law or fact to the master or to a jury, or a commissioner, to be ascertained preparatory to a final decree; in which, though the principles governing the rights of the parties may be settled by its terms, yet a more perfect ascertainment of the facts to which they apply, is necessary to a final disposition of the case. A decree is final when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court and fully and clearly ascertained on both sides, so that the court is enabled upon a full consideration of the case made out, *finally* to determine between them according to equity and good conscience, leaving nothing for the future judgment of the court.
3. SAME. *When a decree may be final, even where it directs a reference to master.* A decree may be final although it directs a reference to the master, provided it contains in itself all the consequential directions that may depend upon the result of the report, when no further decree will be necessary in the case.

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FROM CAMPBELL.

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This was a bill filed in Chancery at Jacksborough, by John H. Hunter and others, heirs and devisees of Andrew Hunter, against Joseph H. Delap and others, asking the construction of the will of said Andrew

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Hunter, and that the rights of complainants and respondents, all of whom were legatees and devisees, might be stated and adjusted. The Chancellor made a final decree in the cause except as to costs, as to all parties but one, as to whom a reference was made to the clerk and master to take an account. From which decree, three of the parties respondent, as to whom the decree was final except as to costs, prosecuted a writ of error to this court; motion was made to strike the cause from the docket of this court, on the ground that it was prematurely brought up, before a decree final in the court below.

SNEED and MAYNARD, for complainants.

ROGERS and BOYD, for respondents.

CARUTHERS, J., delivered the opinion of the court.

In this case there was a decree at the April Term, 1852, of the chancery court at Jacksborough, settling the rights of all the parties, but a reference to the master to ascertain the extent of the liability of Geo. Delap, one of the defendants, to the complainants. With this question, the other defendants had no connection, and so far as they were concerned, the case was fully disposed of except as to costs, as to which the decree is silent. An appeal was prayed by the defendants, and the court, under the power given by the act of 1835, ch. 3, § 17, granted it before the account should be taken and reported by the master as to defendant George, "upon bond and security being given before the next July



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rules." This was not done, but the case was afterwards brought up by three of the defendants, Joseph H. Delap and Reuben Rogers and wife, by writ of error obtained from the clerk of this court upon filing the record. Motion is now made to dismiss the case on the ground that it was prematurely and improperly brought up.

The question to be decided is, whether the state and condition of the case in the court below, was such as to render it *removable* by writ of error, to this court, according to the rules of practice.

The solution of this question must depend upon the finality of the decree below. It is well settled that neither an appeal or writ of error will lie upon an interlocutory decree, except in the single case provided for in our act of 1835, ch. 3, C. & N., 237. The case here excepted from the general rule, is, that where the principles involved in a case are determined, and an account ordered, it shall be in the discretion of the court to allow an "appeal" before the account is taken. The Chancellor in this case, granted the prayer of the defendants for an appeal under that act, upon the condition that the security required by law should be given before the next July rules. This they failed to do, and therefore lost the benefit of the order. Afterwards, three of the defendants prosecuted their writ of error. This is not allowed by the aforesaid or any other statute, nor by the rules of practice, unless the decree made by the court below is a final decree.

It is not always easy to determine whether a decree is interlocutory or final, but upon that distinction this case must turn.

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An interlocutory decree is one made in the progress of a cause for the purpose of ascertaining some matter of fact or law, preparatory to a final decree. This is done by a reference to the master, a commissioner or jury, in an interlocutory decree, by the terms of which, the principles governing the rights of the parties, are generally settled, but a more perfect ascertainment of the facts to which they apply, are necessary for a final disposition of the case. Bar. Ch. Pr., 326.

A decree is final when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained on both sides, that the court is enabled, upon a full consideration of the case made out, *finally* to determine between them according to equity and good conscience. Bar. Ch. Pr., 330. 8 Wend. 224. A decree which disposes of the whole merits of the cause, leaving nothing for the future judgment of the court in the case, which will make it necessary to bring it again before the court for final decision, is a final decree. 7 Paige, 18.

It is said by Judge Spencer, in *Jaques vs. The Methodist E. P. Church*, 17 John. 558, that "no case can be found in which a decree directing a reference to a master, or a feigned issue, for the purpose of ascertaining any material fact in the cause, has been held to be a final decree."

We will not say that a decree may not be final, although it direct a reference to the master. It may be so when it contains all the consequential directions that may depend on the result of the report, when no further decree of the court will be necessary in the case.

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In the decree before us, according to the foregoing rules, the decree was interlocutory, and not final. The case was not finally disposed of as to any of the parties, as no disposition was made of the costs in the cases of those whose rights were settled. As to defendant Geo. Delap, a very material fact was to be ascertained by the reference, before the case could be ended as to him.

It would certainly be a very inconvenient practice, to allow each of many parties as their rights in a cause should be settled by interlocutory orders and decrees, to prosecute writs of error or appeal to the supreme court. The consequence might be, that there would be a multitude of appeals in the same case, coming up at successive terms, and the case still progressing in the court below. A practice leading to such consequences cannot be tolerated.

If any injury is likely to result from an erroneous interlocutory order or decree, a remedy is provided by the act of 1851-2, ch. 181, § 4, authorizing the party to apply to this court in term time, or to any of the Judges in vacation for a supersedeas.

The motion to dismiss is sustained.

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NOTE.—The fourth section of the act of 1851-2, ch. 181, above referred to, is in these words: "That the supreme court, in term time, or either of the judges thereof in vacation, shall have power and authority to grant writs of supersedeas to an interlocutory order or decree, or to executions issuing upon interlocutory orders or decrees in courts of chancery as well as in case of executions issuing upon final decrees. And bond and security may be required by the court or judges to pay the amount of the execution, on the final decision of the case in the court of chancery, or to pay such costs and damages as the opposite party may sustain. And when the supersedeas is issued by the clerk of the supreme court, a copy of the petition and supersedeas shall be filed in the court of chancery, and there remain as part of the record until a final decision of the cause."—REP.

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E. H. Dunn vs. J. S. Oneal.

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E. H. DUNN vs. J. S. ONEAL.

1. PROPERTY. *In product of mechanic's labor. Accession. Lien.* Where the materials of A and B are united by the labor of B, who furnished the principal materials, the property of the joint product is in the latter by right of accession, the materials of the former being considered as only accessory ; but where A furnished the principal materials and B does the work, furnishing a part of the materials of little value, the property in the product is vested in A, subject to B's right to compensation for the making and for such materials as he furnished ; for which he has a lien, and may retain possession until payment is made or tendered.
2. SAME. *Same. Where title claimed by converting materials, and becoming liable for value.* One cannot convert to his own use the materials of another by changing its form and acquire title thereto on the ground that he is liable for their value. He can acquire no title by a wrongful act unless the owner see proper to abandon his property or accept a satisfaction in value. Whatever alteration of form any property has undergone the owner may seize it in its new shape, if he can prove the identity of the original materials.

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FROM POLK.

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This case originated before a justice of the peace in Polk county, in a suit instituted by Oneal against Dunn for the value of two saddles made by one McCoy, the employee of Oneal, for Dunn. McCoy had contracted to work in the saddler's shop of Oneal in Benton, for a specified time, for certain wages agreed upon between them, and with no authority to do any work on his own account. Pending this engagement, he contracted with Dunn for the manufacture of two saddles, for which Dunn furnished the principal materials, some trifling articles being taken from Oneal's stock and used for the purpose. The contract between Dunn and McCoy was that Dunn was to pay him in

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goods, the bargain being on McCoy's own private account. Dunn did not know of the engagement between Oneal and McCoy, nor did Oneal know of the contract between Dunn and McCoy. The saddles were made, delivered and paid for by Dunn, as he had agreed. After which Oneal brought this suit without allowing full credit to Dunn for his materials. At the February Term, 1853, of the circuit court of Polk, (KERR, J., presiding,) there was a verdict and judgment for Oneal, from which Dunn appealed.

GAUT and J. B. COOK, for plaintiff in error, cited 2 Kent, 361. 7 Johns. R., 473. Story on Ag., § 443, *et seq.*

ROWLES and TREWHITT, for defendant in error, cited Story on Ag., § 17, 19, 126, 98, 413.

TOTTEN, J., delivered the opinion of the court.

Oneal sued Dunn in an action of debt upon an account. There was judgment for Oneal, the plaintiff, below, and the defendant appealed in error. In Oneal's account there is a charge for two fine saddles, and that is the only matter now in contest between the parties.

The material facts are these: The plaintiff, Oneal, who had established a saddler's shop in Benton, hired one McCoy, a saddler, to work in said shop. The plaintiff was to furnish all materials and pay McCoy four dollars for each saddle made by him; and all work done in the shop by McCoy was to be for and

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on account of the plaintiff. While McCoy was in this service, and some three months after it commenced, he agreed with defendant Dunn to make two fine saddles for him, Dunn to furnish *all the materials* except the *trees*, of small value, and to pay a reasonable price for the making.

The materials, except the trees, and some other articles of small value, were furnished by defendant to McCoy, who took them to the plaintiff's shop, and proceeded to manufacture the saddles, using the trees and some small articles, the plaintiff's property, to supply a deficiency in defendant's materials. The plaintiff being often at the shop, was informed that the materials were furnished by defendant, and that the saddles were made specially for him; and when made they were delivered with his knowledge and consent.

It does not appear that he knew of said agreement between defendant and McCoy, or that he made any enquiry into the matter; nor does it appear that defendant knew the nature of the contract between McCoy and the plaintiff. He knew that McCoy was engaged at work in the plaintiff's shop. McCoy had done work in the shop for others and received payment for himself. This was known to the plaintiff; and there is reason to believe that in the present case, his intention was from the beginning, to let the saddles be made and delivered, and then to charge the defendant with their full value, crediting him with the value of his materials. But this intention he concealed from defendant, who paid McCoy for making the saddles, and plaintiff, afterwards in a settlement, also paid him by a credit on his account.

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The plaintiff credited the defendant by a part of his materials; but for the cashmere and other materials, no credit was given.

His Honor, the judge, upon this state of facts, instructed the jury, in effect, that the saddles were the property of the plaintiff; that he was entitled to recover their full value, and that it was at his discretion to credit the defendant with the value of his materials or not.

In these instructions we think there is error. It is true, as argued, that while McCoy continued in plaintiff's service, under their agreement, he could do no work at plaintiff's shop on his own account. His time and labor there belonged to the plaintiff; and, under the circumstances, we are to hold the defendant bound to a knowledge of this fact. If he did not know it, it was his duty to enquire, and he cannot be permitted to avail himself of an ignorance which was the result of his own negligence. The plaintiff, too, knew that the defendant had procured the fine materials and sent them to the shop to be manufactured into saddles for the defendant. And now, the saddles being made, the question is, in whom was the right before they were delivered? We answer, in the defendant, because he had furnished the principal materials to be wrought into saddles for himself.

The plaintiff could not acquire a property in these materials, except by defendant's consent, or by right of accession.

As to consent, none is pretended. As to accession, the right cannot exist in his favor; for he did not furnish the principal materials; those which he fur-

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nished were only necessary to supply a deficiency in defendant's materials, which were of greater value.

It is a rule of both the civil and common law, that if the materials of A and B are united by the labor of B, who furnished the *principal materials*, the property in the joint product, is in the latter by right of accession, the materials of the former being considered as only accessory. It is an element in the right, that he furnished the principal materials, which, in the present case, he did not do. *Merritt vs. Johnson*, 7 Johns. R., 473. 2 Kent, 361.

This principle may be illustrated by cases in the civil law; as if one repair his vessel with the materials of another, the property of the vessel remains in him; but if he build a vessel from the foundation with another's materials, the owner of the materials is the owner of the vessel. Nor can the plaintiff claim title to the defendant's materials upon the ground that he had converted them to his own use and become liable for their value. He can acquire no title by a wrongful act, unless the defendant thinks proper to abandon his property and accept a satisfaction in value. For the rule is, that "whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of the original materials." *Betts vs. Lee*, 5 Johns. R., 348.

In any view, it is clear that the plaintiff has no property in the materials furnished by defendant. The property remains in the defendant, though the materials be manufactured into the saddles. How, then, can it be said, that the plaintiff is owner of the product: is owner of the saddles, when it is clear that the defen-



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dant is owner of the materials of which they consist. No such confusion of title can exist.

The result is simply this: The property in the saddles, when completed, was vested in the defendant, subject to the plaintiff's right of compensation for the making, and for such materials as he furnished; for which he had a lien, and might have retained possession until payment was made or tendered.

The judgment will be reversed, and the cause be remanded for a new trial.

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 ISHAM vs. THE STATE.

1. CRIMINAL LAW. JUROR. *Exception propter defectum after verdict, when no objection taken before.* The circuit judge is the trier of all questions appertaining to the qualifications of jurors. It will be presumed that his action is correct, unless he is put in the wrong by exceptions upon the record setting forth the facts upon which he decided. So, when in a capital felony the record did not show that the jurors who tried the prisoner were good and lawful men, or that they were freeholders or householders, but did show that they "were elected, tried and sworn," and that no objection was made to either of them until after the verdict, it is no sufficient ground for a reversal of the judgment upon a conviction. Vide *McClure vs. The State*, 1 Yerg., 215, per Catron, J.
2. INDICTMENT. *Verdict of guilty upon two or more counts, where one is bad.* When the verdict is general, or upon two or more counts, and either count be good, the conviction will stand, no matter how defective the other count or counts may be.
3. ATTORNEY GENERAL. *Where an indictment is preferred by the regular officer, and the cause prosecuted by an Attorney General pro tempore.* It will be presumed that the court would not permit any one to enter upon and dis-

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*Isham vs. The State.*

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charge the important functions of attorney general, without some valid reason and a regular appointment. So when it appeared of record that the indictment was preferred by the regular attorney general, and the case prosecuted in court by an attorney general *pro tem*, as to whose appointment the record is silent, there is no error. Act of 1851-2, ch. 256, § 5.

4. TECHNICALITIES. *In criminal prosecutions.* The day has passed when the guilty can be rescued upon mere technicalities, the legislature has wisely willed it, and the courts will favor rather than obstruct a reform so just and salutary in our criminal jurisprudence.

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FROM JEFFERSON.

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The plaintiff in error, a negro slave, was indicted in the circuit court of Jefferson, for an assault and battery upon a free white female with intent to commit a rape. At the August Term, 1843, of said court, he was tried, (HYNDS, J., presiding,) convicted and sentenced to death. His motions for a new trial and in arrest of judgment were made, and severally overruled, and he appealed in error to this court. The testimony is not embodied in the record. The indictment which was preferred by the regular Attorney General, W. R. Caswell, contained five counts, upon the second and fourth of which the prisoner was convicted, the fourth being defective. The order of the court appears in the record, commanding the sheriff to summon a panel of jurors of "good and lawful men of said county," out of which panel the jury were selected. It further appears in the record, that the jury were "elected, tried, and sworn," but it does not recite that they were good and lawful men, or that they were freeholders or householders; nor does it appear that any objection was made at the time. It appears also, that Jacob Peck, Esq., appeared in the trial of the cause as

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attorney general, *pro tempore*, the record being silent as to his appointment or the reason for the same.

SWAN, Attorney General, for the State.

LYON, CUMMINGS, and SWAN, for the prisoner. They cited 1 Meigs' Dig., § 175, p. 110, 111. 3 Humph., 372. Const., art. 6, § 5. Act 1835, ch. 28, § 2.

CARUTHERS, J., delivered the opinion of the court.

This was a conviction in the circuit court of Jefferson, for an assault and battery with intent to commit a rape upon Mary W. Riggs, a free white female, in the county of Jefferson.

It is assigned for error here: 1. That the record does not show that the jurors who tried the defendant possessed the qualifications required by law. True, it is not expressly stated that they were citizens of the county or freeholders, or householders, or even "good and lawful men." Yet it appears that they were "elected, tried and sworn." No objection was made by the accused to any of them, so as to bring any question before us on their competency. The circuit Judge is the trier of all questions appertaining to the qualifications of jurors. It must be presumed that his action was correct unless he is put in the wrong by exceptions upon the record setting forth the facts upon which he decided. In the case of *Turner vs. The State*, 9 Humph., 119, this precise question came before the court in relation to a grand jury. All that we now do is to extend

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the principle there laid down. There is no reason for a distinction. There is then, nothing in the objection.

2. It is objected that as the conviction was upon the second and fourth counts, and the latter is bad, the verdict should be set aside. This position cannot be sustained. If the verdict is general, or upon two or more counts, and either count be good, the conviction will stand, no matter how defective the other may be. No objection is taken to the second count, but it is admitted to be unexceptionable.

3. The record shows that Jacob Peck appeared in the prosecution of the case as attorney general *pro tem*, when it does not appear that he was ever appointed to that position, or that any necessity existed by the absence of the attorney general or otherwise, for such an appointment. But the indictment was signed and preferred by the attorney general for the circuit, and only prosecuted by the *pro tem*. Perhaps no case has ever gone so far as to make the objection here taken available. In the cases of *Staggs vs. The State*, 3 Humph., 372. *Hite vs. The State*, 9 Yerg., 198, and others cited, the indictments were not preferred by the regular attorney general. But the act of 1852, forbids a reversal in such cases as these. By that act it is declared that if the record does not show that the person who signs the indictment as attorney general *pro tem*, was appointed, it is not error. It must be presumed that the court would not permit any one to enter upon and discharge the important functions of this officer, without the existence of some necessity, and a regular appointment.

The objections in this case are all purely technical, and have no reference to the merits. The proof is not

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even given on which the conviction was founded. From which fact it must be inferred, that it was entirely conclusive of his guilt. The day has now passed for rescuing the guilty upon mere technicalities. The legislature has wisely willed it, and it is not for the courts to resist the great reform. We would favor rather than obstruct it.

The judgment will be affirmed, and the sentence executed.

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G. M. HAZEN *et al.* vs. THE UNION BANK OF TENNESSEE.

1. CONSTITUTIONAL LAW. *Charter of the Union Bank. Interest.* The grant in the charter of the Union Bank of Tennessee, passed in 1832, allowing the bank to demand and receive interest in certain cases therein specified, at the rate of seven per cent per annum, is a valid franchise not repugnant to the constitution.
2. CORPORATION. *Legislative power over. Contract.* The power to grant corporations is an incident of sovereignty, and belongs to every sovereign State. The act of incorporation being legal in itself, is a contract between the State and the incorporators, investing them with a legal estate in the franchises named in the charter, and being such a contract, it is under the protection of the Constitution of the United States, and is irrevocable and inviolable by any act of the Legislature of the State, or a convention of the State. *Vide* 4 Wheaton R., 318.
3. INTEREST. *Const., art. 11, § 6. Act 1835, ch. 50, § 3. Franchise.* By the constitution of 1834, it is provided that the Legislature shall fix the rate of interest, and the rate so established, shall be equal and uniform throughout the State; and the act of 1835, ch. 50, § 3, in pursuance thereof, fixes the legal rate of interest at six per cent per annum, and at that rate for a longer or shorter period. It seems, therefore, that no grant of a franchise subsequently made, can have a legal existence in this State, which allows

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the taking of a greater rate of interest than such as is fixed by the general law.

4. **BANK CHARTERS.** *Their constitutionality. Partial law.* A legislative grant of the ordinary franchises for banking, is not a partial law in the sense of the constitution. It is in the nature of a contract, rather than a "law of the land," as that term is understood to be used in the constitution. It has never, therefore, been considered that laws containing these exclusive grants of the privilege of banking, are repugnant to the constitution as not being "laws of the land" of general application.

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FROM KNOX.

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This was a bill filed in Chancery at Knoxville by the plaintiffs in error, G. M. Hazen, Joseph Kimbrough, and John B. Shipman, to enjoin the collection of a note upon which the bank had instituted suit in the circuit court of Knox county, of which said note G. M. Hazen was the maker, and the two latter named, the endorsers. The note was for the sum of \$3,300, all of which the complainants alleged to be usurious, and prayed an account of the usury; that the suit at law be enjoined, and the note delivered up and cancelled. It seems that in 1841, the plaintiff, Hazen, was indebted to the "Union Bank of the State of Tennessee," at its Knoxville branch, as drawer or endorser of commercial paper in the sum of \$20,359.76. Partial payments were made, and the paper renewed and discounted from time to time, for a number of years, until the 14th of August, 1849, when Hazen, with Kimbrough and Shipman, his endorsers, who are also plaintiffs, executed his note for \$3,300, due at four months, which was discounted, and is now held by the bank. This was a renewal note, taken for a balance and remnant of the original debt. At each renewal and

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discount, where the paper had four months to run to maturity, which seems to have been the usual term in this series of transactions, the bank charged and received interest at the rate of *seven per centum per annum*.

The bill insists that this was usurious to the extent of *one per cent*, and that the usury thus received by the bank, taken in the aggregate, amounts to more than \$3,300, the sum specified in said note; that the note is therefore altogether usurious, being the remnant and final result of said usurious transaction. On the other hand, the bank denies the usury, and insists that it had a legal right, under its charter, to charge and receive interest at the rate of *seven per cent per annum*.

There was a decree in favor of the bank, from which the complainants appealed to this court.

SNEED and TEMPLE, ROGERS and BOYD, for plaintiffs in error.

WELCKER and LYON for the bank.

TOTTEN, J., delivered the opinion of the court.

By the charter of the Union Bank of Tennessee, (1832, ch. 2, art. 11,) it is provided, that paper having over ninety days and under six months to run to maturity, may be discounted at the rate of seven per cent per annum. If this provision in the charter be valid under the constitution, there is no usury in this case; if invalid, there is usury to the extent of one

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per cent, as charged in the bill; and this is the question which we are to consider.

The counsel for the plaintiff, in stating their argument, say that, by the general law, (1819, ch. 32,) in force now and at the date of said charter, the legal rate of interest is six per cent per annum; to take a greater sum is a public offence, punishable in a legal proceeding. That under the constitution, no one's rights can be taken or affected "but by the judgment of his peers or the law of the land;" by which is meant a general public law, equally binding, in like circumstances, on every member of the community. That the bank has taken a greater rate of interest than others can take under the general law; and that its charter, permitting it to do so, is a *partial law*, and therefore repugnant to the constitution.

In considering this question, it may be observed, that the power to grant corporations is an incident of sovereignty, and belongs to every sovereign State. With us it is exercised by the Legislature, and it may lawfully confer upon the corporators any rights and privileges it may deem proper and expedient, not inconsistent with the constitution of the Union or the State.

In the present case, the act of incorporation creating a bank, confers upon it such rights and privileges as was deemed necessary and proper for the success of the institution.

It is a *private* corporation, because private persons are incorporated, and in connexion with the State, are owners of its stock. 2 Kent, 275.

In consideration of the privileges granted by the charter, the bank agrees to pay to the State annually,



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one half of one per cent on the capital stock paid in by the stockholders other than the State. § 11.

The act of incorporation is therefore a contract, founded upon consideration, between the State and the corporators; not, indeed, that any such consideration was necessary to give it that character. And being a contract, investing the corporators with a legal estate in the franchises named in the charter, it is under the protection of the constitution of the United States, and is irrevocable and inviolable by any act of the Legislature of the State, or a convention of the State. This is now a well settled doctrine. *Dartmouth College vs. Woodward*, 4 Wheaton R., 318. *Union Bank vs. The State*, 9 Yerg. R., 491.

It is not like an ordinary law prescribing a rule of action, which should be general in its nature, but is a *law in the nature of a contract*, granting a franchise to the corporators, and investing them with a legal estate therein. It must, of necessity, be limited and restricted in its operation to the persons to whom the franchise is intended to be granted, and denied to others. Yet, it cannot be deemed a *partial law* in the sense of the constitution, and repugnant to its provisions. We may observe that the business of banking was a common law right, which any person at his discretion, might lawfully exercise, until it was restrained by the act of 1827, upon considerations of public policy and convenience. *Ohio Ins. Co. vs. Merchants Ins. Co.*, 11 Humph. R., 23.

That law operates as a general prohibition against the exercise of this right, except where it may be granted as a franchise to natural persons or incorporated companies. But it has never been considered that the laws

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containing these exclusive privileges of banking, are repugnant to the constitution as not being "*laws of the land*," of general application.

A right to take a greater interest than is allowed by the general law, is a part of the franchise granted to the company; and for its validity must depend upon the same principle as that upon which the corporation itself depends; that is, the inherent power of the State to make the grant. The right to take a greater interest is an exclusive grant denied to others; and so, the right to pursue the business of banking is in virtue of an exclusive grant, denied to others; and if the one be repugnant to the constitution on the ground that it is not a general law, or "*law of the land*," so must be the other.

But we have seen that a law creating a corporation and granting a franchise, is more in the *nature of a contract* than a "*law of the land*," in the sense of the constitution.

The one is public, general and equal in its operation, and subject to be altered or repealed at the will of the legislature; while the other is special, exclusive and unequal in its operation; and being in its nature a contract, is not subject to the will or action of the Legislature. In a word, the one is a public law, the other, a legislative grant. And we may observe, that in England corporations are created and may exist by royal charter merely, as well as by legislative grants. 2 Kent., 276.

There was nothing in our State constitution at the date of defendant's charter, (1832,) which declared that interest shall be at a uniform rate. This provision is

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G. M. Hazen *et al.* vs. The Union Bank of Tennessee.

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contained in the reformed constitution of 1834, and being general and imperative in its terms, it is apprehended that no law or grant of a franchise can have a legal existence, which stands in opposition to it. But it can have no application in the present case; it being of a date subsequent to the grant of the charter; and besides, it contains a provision, that nothing in it shall impair the validity of existing contracts. Article 11, § 2.

The counsel for the plaintiff have referred to *Budd vs. The State*, 3 Humph., R., 483. That was an indictment for felony, founded upon a section of the charter of the Union Bank; but the court expressly say that it was not to be regarded as part of the contract between the State and the corporation; but as a statute having no connexion with the charter of the bank. We do not consider that the principle of that case has any application to the one now before us. It simply decides that a law for the criminal punishment of the officers of a particular bank, is partial in its nature, and not a "law of the land."

We are of opinion that the grant in the charter, allowing the bank to take interest at the rate of seven per cent per annum, in the case specified, is a valid franchise, not repugnant to the constitution.

The decree of the Chancellor will be affirmed.

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William Edington vs. Wiley Pickle.

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WM. EDINGTON vs. WILEY PICKLE.

1. SET-OFF. *Mutuality of demands. Jurisdiction.* The jurisdiction of the courts in cases of set-off, depends upon the existence of mutual, adverse and actual demands, between the plaintiff and defendant. 1. They must be mutual, i. e. for a sum certain, and of the same grade and nature. 2. They must be actual, subsisting debts, i. e. there must be legal debts on both sides, found by the jury or justice, to be due at the time the judgment on the set-off is rendered. So, when the claim of the plaintiff is wholly disallowed, the court or justice has no jurisdiction to render judgment in behalf of the defendant for the amount claimed as set off.
2. SAME. *Justice of the peace. Act of 1815, ch. 53. Construction.* The act of 1815, ch. 53, which provides that it shall be lawful when a suit is brought before a justice of the peace, and the defendant shall plead a set-off, and on a fair examination of their accounts it shall appear that there is a balance due the defendant, to enter up judgment against the plaintiff for said balance, applies to a *balance* due on the examination of conflicting accounts. The intention is, that when there are mutual demands and the defendant's is the greater of the two, he shall not be forced to a cross action to recover such balance, but in *that* action he shall so far be regarded as plaintiff as to obtain a judgment for the amount so found to be due him, after the judgment of the plaintiff is extinguished.
3. ACTION. *The criterion on a quantum meruit. Jury.* The question in an action on a *quantum meruit* is not alone the benefit and advantage derived by the defendant from the services of the plaintiff, but how much does the plaintiff deserve or merit for the work done or the services performed for the defendant at his request, either express or implied. It may often happen that the defendant derives no benefit or advantage, yet, this may not be the fault of the plaintiff, and would not be any defense to a claim for meritorious services rendered. It must be left to the jury to determine, whether, under all the circumstances, the plaintiff actually deserves, or merits any compensation for the services rendered.

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FROM KNOX.

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This action was brought before a justice of the peace in Knox county, by Wm. Edington against Wiley Pickle, on an account for ten dollars for teaching the defendant

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William Edington vs. Wiley Pickle.

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the mysteries of psychology and clairvoyance. There was judgment before the justice for the plaintiff for the sum claimed, and costs, less one dollar and fifty cents admitted by him as set-off. The defendant brought the case into the circuit court of Knox county by *certiorari*, where at the June Term, 1853, it was submitted to a jury, whose verdict was in these words: "We find that the plaintiff does owe the defendant one dollar and fifty cents," and a judgment rendered thereon. There was proof that the defendant attended the lectures and witnessed the experiments of the plaintiff, but no proof of any contract between them. The plaintiff claimed on a *quantum meruit*; and his Honor, Judge ALEXANDER, charged the jury as follows: "If the plaintiff has established by proof, a contract, both parties must abide by it; and the plaintiff should recover, although the defendant may not have derived any benefit from plaintiff's services. But if there was no proof of a contract, and the plaintiff relies upon a *quantum meruit*, then it should be shown that the defendant was benefitted by the services of the plaintiff.

The plaintiff's motion for a new trial being made and overruled, he appealed in error to this court.

KAIN, for plaintiff.

SNEED and TEMPLE for defendant.

CARUTHERS, J., delivered the opinion of the court.

This suit was commenced by warrant before a justice of the peace, for the sum of ten dollars, which

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William Edington vs. Wiley Pickle.

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was charged for teaching the defendant the art and mysteries of psychology and clairvoyance. No contract was made, but the defendant received the instructions of the plaintiff, who claims the said amount on a *quantum meruit*. The defendant insisted that he did not assume to pay the plaintiff any thing, and had a just adverse account against him for one dollar and fifty cents.

In the circuit court the verdict of the jury was in these words: "We find that the plaintiff does owe the defendant the sum of one dollar and fifty cents." This is the entire verdict, and the court gave judgment upon it in favor of the defendant for the amount. A new trial was refused, and the case brought up by the plaintiff.

Now, can this judgment be sustained? We think not. By the act of 1756, ch. 4, § 7, C. & N., "where there are mutual debts subsisting between the plaintiff and defendant, one debt may be set-off against the other." But this was only defensive until the act of 1815, ch. 53, which provided, that, it should be lawful where a suit was brought before a justice of the peace, and the defendant shall plead a set-off," and on a fair examination of their accounts, it shall appear that there is a balance due in favor of the defendant, to enter up judgment against said plaintiff." This only applies to a "*balance*" due on examination of conflicting accounts. The intention is, that where there are mutual demands, and the defendant's is the largest, he shall not be put to a cross action to recover the balance that may be due to him, but in that action he shall so far be regarded as plaintiff as to obtain a judgment for the

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amount that may be thus found to be due him after extinguishing the demand of the other party. But here it is not found that the plaintiff has any account against the defendant, who is allowed the whole amount of his account. We do not think the justice or the court has any jurisdiction in such a case. The act of 1815 was only intended to apply to cases where adverse accounts existed upon a comparison of which a *balance* was found due to defendant.

We are not aware that this question has ever before been presented to this court. It is true that it has been decided that the plaintiff could not dismiss his suit after a plea of set-off by the defendants, because such a plea was in the nature of a cross action, and the defendant cannot be deprived of the benefit thereof, by the act of the other party. But this is entirely a different question.

A similar statute of the State of Massachusetts was construed by the supreme court of that State, in the case of *Cummings vs. Pruden*, 11 Mass. R., 206, in accordance with this opinion.

The judgment for defendant must, therefore, be reversed for want of jurisdiction, so far as it embraces a recovery of his account against the plaintiff, as we have seen that this can only be done when adverse accounts are found, upon comparison of which, a *balance* is found to be due to defendant.

But this case involved two issues, one upon the implied promise of defendant to pay the plaintiff as much as he deserved to have for work and labor, and the other upon the adverse account of defendant against the

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William Edington vs. Wiley Pickle.

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plaintiff for goods sold, relied upon as a set-off. There is no finding in this verdict upon the first issue. The result then, will necessarily be, according to the case of *Barnard vs. Young*, 5 Humph., 100, that the judgment must be arrested and a new trial awarded, unless the act of 1851-2, ch. 152, § 7, has changed the practice. It is there provided, "that any defect in entering a verdict where there are different issues, or the verdict is not responsive to the issues, must be made before judgment is entered, or the objection will be waived." In this case objection was taken before the judgment was entered. For this, and perhaps other reasons, the late act does not apply.

In the case of *Barnard vs. Young*, the defendant released the amount found in his favor, but still the court held that the defect in the verdict could not be cured, and that the preservation of those technical rules, deemed important for maintaining the symmetry of our institutions, and for the protection of the rights of the citizens, compelled them to reverse the judgment. If the question were open we might be inclined to hold that the verdict in this case, by necessary implication, involved a finding against the plaintiff; in which case, judgment final could be here given in favor of the defendant against the plaintiff, for costs. But we would not disturb the law as settled by our predecessors on slight grounds.

It may be further remarked, that although such claims as that set up by the plaintiff are not entitled to much favor, yet the law should be administered to all in even scales. We do not say that the jury should



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have allowed anything to the plaintiff for his services in this case; that is not a question for us, but for the jury on a correct charge of the law.

The defects of the charge given by the court in this case, would not, of themselves, be regarded as sufficiently important to authorize a new trial in the absence of any request by the plaintiff to enlarge or explain it. The criterion in an action on a *quantum meruit*, is not the "benefit and advantage derived by the defendant from the services of the plaintiff," alone, as charged by the court below. The question in such case, is, how much does the plaintiff deserve or merit for the work done, or instructions rendered to the defendant at his request, either express or implied. It may often happen that the defendant derives no benefit or advantage, yet this may not be the fault of the other, and would not be any defense to a claim for meritorious services rendered. So, it must be left to the jury to determine, whether, under all the circumstances, the plaintiff actually deserved or merited any compensation for the services rendered.

We feel, therefore, reluctantly constrained to reverse the judgment in this case, and award a new trial.

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Robert Raulston vs. Shadrack Jackson.

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## ROBERT RAULSTON vs. SHADRACK JACKSON.

1. MALICIOUS PROSECUTION. *Evidence. Character of, required in defense.* In an action of malicious prosecution the defendant is only required to show, that at the time he instituted the prosecution he acted upon such a state of facts known to him, or derived from reliable information, as would induce a belief in the mind of a prudent, discreet man, that the crime had been committed, and by the man he was about to prosecute; and this belief may be based purely upon circumstantial evidence, both as to the *corpus delicti* and the probable guilt of the party accused.
2. SAME. *Same.* The question in an action for malicious prosecution is not whether the plaintiff in such action be really guilty of the crime alleged against him, but whether reasonable grounds existed for the defendant to believe him so. It might often turn out that no crime had, indeed, been committed, and yet the prosecutor be justifiable, because of the existence of reasonable grounds to believe that the crime had been committed, and that the party accused was the guilty agent.
3. ACTION FOR MALICIOUS PROSECUTION. *Its application.* The action for malicious prosecution is only intended to apply to cases where a criminal accusation has been made against an innocent man through malice, and in the absence of even a fair and reasonable probability of its truth. In such case the criminal law is grossly abused, and for the most unworthy purposes, and condign punishment in the way of damages, should be inflicted.

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FROM MARION.

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The plaintiff in error instituted a criminal prosecution against the defendant in error before a justice of the peace in Marion, on a charge of larceny. The defendant in error was discharged by the justice, and the prosecutor taxed with costs; whereupon the defendant brought this action in the circuit court of Marion for malicious prosecution, and at the November Term, 1852, recovered a verdict and judgment for \$275. A motion for a new trial being made and overruled, the plaintiff in error appealed. There was much circumstantial proof adduced on the trial to show probable cause for the prosecution,

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Robert Raulston vs. Shadrack Jackson.

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which it is unnecessary here to recite. The error assigned, is in the charge of his Honor, Judge KEITH, to the jury, which is as follows: "In an action for a malicious prosecution for a felony, where want of a probable cause is to be inferred from the fact of a discharge of the prisoner, the burthen of proving the probable cause lies on the defendant. It is a compound question of law and fact, and to make it out he must establish, by direct evidence, that the felony charged has been committed, and show facts and circumstances pointing to the plaintiff as the person who has committed the felony."

SMITH, for plaintiff in error, with whom was HYDE, who said:

1st. In an action of malicious prosecution, whether the circumstances alleged to show probable cause for the prosecution are true and existed, is a question of fact for the jury. If true, whether these facts and circumstances amounted to a probable cause is a question of law for the court. This rule was laid down in the leading case of *Johnson vs. Sutton*, 1 Term R., 510, and has been approbated and sustained by the courts of England and this country up to this time. (See *Munns vs. Dupont*, 1 Am. Leading Cases, 209.)

2. The charge that direct testimony is essential to establish the felony charged in the warrant, in order to make out probable cause, was, in effect, excluding from the jury any consideration of the truth or existence of the facts and circumstances relied upon in defense, because no direct or positive evidence of the commission of the felony was adduced before the jury, but

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Robert Raulston vs. Shadrack Jackson.

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the evidence upon the fact of a larceny having been committed was purely circumstantial.

3. That the felony must be established by direct or positive evidence in an action of malicious prosecution for a felony, is, we insist, opposed to the whole current of authority upon the subject. Probable cause not only embraces the fact of a felony having been committed, but the circumstances pointing to the party accused; and whether this combination of facts and circumstances amounts to probable cause, depends upon the belief of the prosecutor, supported by such circumstances as would induce a reasonable man to believe the person charged guilty of the offence. See 1 Am. Leading Cases, 221. In another case it is said, "any thing which will create in the mind of a reasonable man *the belief that a felony existed*, and that the party charged was connected with it, is probable cause." *Id.* 221. The question of probable cause does not turn upon the actual guilt or innocence of the accused, but on the prosecutor's belief upon reasonable ground. It matters not how innocent the plaintiff may have been, probable cause rests upon the facts known to the prosecutor at the time the prosecution was begun. Again, probable cause is defined to be "a deceptive appearance of guilt arising from facts and circumstances misapprehended or misunderstood, so far as to produce belief, and not to depend on facts, but the belief of them." *Id.* 221. In the case of *Farris vs. Starkie*, 3 Monroe, 11, the court says: "The question is not whether the plaintiff was actually guilty, but whether the defendant had reasonable grounds, from the facts known to him, and the communications made to him, to believe him so." See same authority and

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cases referred to. See also, *Hall vs. Hawkins*, 5 Hum., 537. If the authorities above referred to are to be regarded as law, a man may well prosecute upon information derived from others if the information is of a character to excite reasonable belief, and comes from a source entitled to credit. In this case, the witnesses who depose to the facts from which a felony may be inferred, could not positively swear that the articles charged to be stolen were actually taken; they might be mistaken in the difference of three or four inches in the height of the stock of middlings, or be mistaken in the number of lumps of salt left; probably some mischievous person, in a prank, might have made all the signs discovered, and carried nothing away; yet, they believed a larceny had been committed, and communicated it as a fact to Raulston, who, himself, examined the condition of the roof, and saw the spots of grease on the hen-house and scythe, all going to corroborate the statement made to him. This statement made to Raulston, in connection with the corroborative signs, we insist, was sufficient to create the belief in a reasonable mind, that a larceny had been committed, and great injustice was done to the plaintiff in error in not leaving the facts open to the jury in this light.

MINNIS, for the defendant in error, said:

The only question in the case, and the question made below, and upon which this cause was brought to this court, is, whether the acquittal by the justice in a felony, and the taxing the prosecutor with the cost, is *prima facie* evidence of a want of probable

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Robert Raulston vs. Shadrack Jackson.

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cause, and throws the burthen of showing probable cause on the defendant. We maintain the affirmative, and this view was sustained by the court below. It is so laid down by Starkie on Evidence, and most of the elementary works, and so held by this court in the case of *Williams vs. Norwood*, 2 Yerg., p. 329, upon the authority of *Johnson vs. Martin*, 3 Murph., R., 348. And it is believed this doctrine has never been questioned in this State since the case of *Williams vs. Norwood*, until this case.

In this case it could not have had any material bearing on the jury, as all the circumstances of the original charge were before the jury, and their verdict rendered upon the whole case. But we insist the doctrine was correctly laid down by the circuit judge.

CARUTHERS, J., delivered the opinion of the court.

The defendant prosecuted the plaintiff for larceny. The magistrate discharged Jackson and taxed Raulston with the cost. This suit was then instituted for malicious prosecution, and a verdict recovered in the circuit court of Marion for \$275.

The only question here made, which it is material to examine, is upon this part of the charge of his Honor, the circuit judge: "To make out his defense, the prosecutor must establish, by direct evidence, that the felony charged in the warrant has been committed, and show facts and circumstances pointing to the plaintiff as the person who has committed the felony."

It is not the law that in order to justify the institution of a criminal proceeding for felony, the prose-

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Robert Raulston vs. Shadrack Jackson.

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cutor must be able to prove by direct evidence, that a felony was perpetrated, any more than that the person charged is the perpetrator. Circumstantial or presumptive evidence will be sufficient on both points. Surely if conviction can be founded on the proof of circumstances, it shall not be required of one who has instituted a prosecution and failed to sustain it, to do more in making out his defense to an action of malicious prosecution, than to establish the *corpus delicti* by the same description of evidence. *Direct* and *positive*, as applied to evidence, are generally understood as convertible terms. The jury, under this charge, could not find for the defendant, unless he was able to prove, and that by direct or positive evidence, not circumstantial, though equally convincing to them, that the crime of larceny had been committed by some person. This was erroneous, and may have been fatal to the defense before the jury. The law on this point is, and should have been so charged by the judge, that if the jury found from the proof, that the defendant, at the time he instituted the prosecution, acted upon such a state of facts known to him, or derived from reliable information, as would induce a belief in the mind of a prudent, discreet man that the crime had been committed and by the person he was about to prosecute, he was not liable.

The question is not whether the defendant is really guilty, but was there good and reasonable grounds for the prosecutor to believe he was. This enquiry necessarily involves two points: first, as to the existence of the crime, and secondly, the connection of the defendant with it. There can certainly be no distinction in the

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James Roach vs. James S. Boyd.

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character or measure of evidence required to establish them. Instead of requiring direct evidence of the fact of the crime, it may certainly often happen that no crime was in fact committed, and yet the prosecutor justifiable, because of the existence of probable or reasonable grounds to believe the criminal act had been done, and by the accused. If men were not allowed to act upon such grounds, crimes would often go unpunished for want of prosecutors. This action is only intended to apply to cases where a criminal accusation is made against an innocent man through malice, and in the absence of even a fair and reasonable probability of its truth. In such a case the criminal law is grossly abused for the most unworthy purposes, and condign punishment, in the way of damages, should be inflicted.

Judgment reversed and a new trial awarded.

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JAMES ROACH vs. JAMES S. BOYD.

1. LAND LAW. *Jurisdiction of courts of law. Void grant. Evidence to impeach. Conflict of entry.* It is well settled in this State that a court of law may, in some cases, declare a grant to be void for causes antecedent to and *dehors* the grant. So, where on a trial of title, the plaintiff produced his grant founded upon an entry, and the defendant relied upon a younger grant founded upon an older entry: *Held*, that as the defendant's title depended upon his entry, and he produced it himself to defeat the plaintiff's *prima facie* superior title, he thereby exposes it to scrutiny and impeachment for



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James Roach vs. James S. Boyd.

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any legal cause, and to assail it under such circumstances was no violation of principle or departure from authority.

2. **SAME. Void entry.** An entry made in an office which is vacant, and the entry received and recorded by a person who had access to the books, but no color of right or authority to exercise the functions of the office, is a nullity, and a grant based thereon communicates no title.
3. **TRESPASS QUARE CLAUSUM FREGIT. Right of Action. Possession.** A party in actual possession under grant, even though it be adverse to an older, valid and subsisting title, is to be regarded as in possession to the extent of the boundaries of his grant, and may maintain trespass against any wrong-doer having no title or authority to enter.

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FROM KNOX.

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Boyd brought his action of trespass *quare clausum fregit* before a justice of the peace in Knox county, against Roach, for injuries done his land by felling and carrying off timber. There was judgment before the justice in favor of Boyd, and Roach removed the cause by *certiorari* into the circuit court, where, at the February Term, 1853, (before Judge HYMDS, presiding,) there was judgment and verdict for Boyd, from which, after new trial refused, Roach appealed in error to this court. On the trial below both parties claimed title to the *locus in quo* of the alleged trespass; Boyd, by a grant issued on the 10th of January, 1850, founded on an entry made in the Entry Taker's office of Knox county on the 9th of January, 1850, and Roach by grant issued 29th of May, 1850, founded on an entry made in said office on the 6th day of October, 1849; both of which grants covered the land in dispute. It seems, however, that Roach's entry was received and recorded in the books of the entry taker's office, while said office was vacant, and by a person who had cus-

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James Roach vs. James S. Boyd.

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tody of the same, but who had no legal authority to receive and record entries.

H. MAYNARD, for plaintiff in error, cited 4 Kent, 425, *et seq.* 9 Yerg., 325.

ROGERS & BOYD, for defendant in error, cited 1 Humph., 319. 3 Hay., 141. 1 Kent, 314. 4 Yerg., 485. Cooke's R., 247. 2 Meigs' Dig., § 1284, 1521. 1 Swan, 324. 9 Humph., 771. 2 Saunders on P. & E., 876. 3 Starkie, 1436. 2 Stewart & Porter, 83. 2 Greenl., § 618. 14 Wend., 241. 9 Humph., 403-4.

McKINNEY, J., delivered the opinion of the court.

This is an action of trespass, and the case rests upon the question of title. Each party claims to be owner in fee of the premises. Boyd, the plaintiff below, claims under a grant dated the 10th of January, 1850, founded on an entry made in the entry taker's office of Knox county, on the 9th day of the same month, for twenty-two acres. Roach sets up title under a grant to him dated the 29th of May, 1850, for twenty-five acres, purporting to be founded on an entry made in said office on the 6th of October, 1849. Both grants are for the same land, and both cover the *locus in quo*.

It appears that after the issuance of the grant to Boyd, and before the commission of the alleged trespass, he enclosed a small field within the bounds of said grant, and actually occupied and cultivated the same prior to, and at the time of the trespass. Roach never was in the actual possession of any part of said land.

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James Roach vs. James S. Boyd.

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It further appears, that in 1793, a grant was issued by the State of North Carolina to Samuel Carrick, for one hundred acres of land, which includes the land covered by both the above mentioned grants. The proof shows that Carrick, the grantee, died many years since; that his family removed beyond the limits of the State long since, and are understood to be all dead; and that since their removal, no claim on their behalf, has been made to the land in dispute.

An attempt was also made to show title in the plaintiff, Boyd, to the land in question, under a conveyance to his ancestor, from the heirs of Samuel Carrick, of an adjoining tract of two hundred and seventy-four acres, granted by North Carolina to said Carrick; but it is clear that the boundaries of said conveyance cannot, upon any recognized principle, be made to include the land in dispute.

The question of title, then, as between the present parties, (leaving out of view, for the present, the elder, dormant title under the grant to Carrick,) depends solely upon the conflicting grants before noticed.

Boyd's is the older grant, but his entry is younger than the supposed entry of Roach; and the latter entry, which is admitted to be *special* upon its face, if valid, would, upon a principle peculiar to our land law, confer the legal title upon Roach.

But we think it clear upon the facts established in this case, that the entry of Roach must be regarded as a nullity, and consequently that the grant founded upon it is void; because at the time this so called entry was made, the office of entry taker was vacant, and the entry was received and recorded by a person who had access

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James Roach vs. James S. Boyd.

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to the books, but who had no color of right or authority to exercise the functions of that office.

It would seem to be scarcely necessary, for the decision of the present case, to enter upon a description of the somewhat vexed question, as to the competency of a court of law to declare a grant void. It is well settled in this State, that in some cases this may be done for causes antecedent to and *dehors* the grant.

The present case falls within a different category, from those referred to, in which the ground of objection to the exercise of this jurisdiction, is, the inadmissibility of allowing the party claiming in opposition to the grant, to impeach it in a court of law, on the trial of an action of ejectment, for matter beyond, not apparent upon its face. In this case, upon general principles, Boyd might well stand upon his older grant, as vesting him with a perfect legal title, as against the younger grant of Roach; but by the principle of our law, before alluded to, the younger grantee is permitted at law, to introduce his older entry, and thereby overreach the older adverse grant. Here, therefore, it is the grantee himself who seeks to go beyond his grant, and to give in evidence his entry, for the purpose of defeating the *prima facie* superior title. He is compelled to do so, for by force of his entry alone, can he prevail over the older grant. And being driven to the necessity of offering in evidence and relying upon his entry, and his title being dependant solely upon the character and validity of his entry, he himself exposes it to scrutiny, and consequently to impeachment for any legal cause; and in assailing it we perceive no violation of principle or departure from authority. That the entry in the present case is simply

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a nullity, is a proposition which we think admits of no debate; and being so, it cannot be the foundation of any right in the plaintiff in error, under the circumstances in this case. It appears, therefore, that, the supposed title of Roach out of the way, he stands upon the footing of a mere naked trespasser.

But, it is assumed in argument, that the grant to Boyd is also void, and incapable of vesting him with any right, as against Roach, or any other person, on the ground that the land had been previously granted to Carrick. In this conclusion we do not concur. As against an older, valid and subsisting title, Boyd's grant would unquestionably be inoperative and voidable. But still, it may have the legal effect of ripening into an indefeasible title as against the older grant. And therefore, it would seem to follow, that the person in actual possession under such younger grant, as against a mere wrong-doer, having no title or authority to enter, is to be regarded as in possession to the extent of the boundaries of his grant, and is entitled to maintain trespass for any injury to his rights. Hence, it results that there is no error in this record, affecting the merits; and the judgment is affirmed.



CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

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NASHVILLE: DECEMBER TERM, 1853.

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W. H. McNAIRY *vs.* JOHN THOMPSON *et al.*

1. **CONTRACT.** *Rule of construction. Intention.* The sole object of the rules and principles laid down for the exposition of contracts, is to do justice to the parties by enforcing a performance of their agreement, according to the sense in which they mutually understood it at the time it was made. The governing principle of construction is the intention of the parties; and that intention may be ascertained by looking to the situation of the parties; the motives which induced the agreement, and the objects and purposes designed to be effected by it.
2. **SAME.** *Same.* In expounding a deed or other instrument, the construction must be upon the entire writing, so that one part may help to expound the other; and all its *recitals* may be looked to and used to explain any doubts which may arise as to the intention of the parties.
3. **SAME.** *Covenant of indemnity. Construction.* W. H. M. & M. M. H., who were merchants, executed and delivered to the covenantees, the following covenant, to-wit: "Whereas, J. M. H. and M. H., executor and executrix of the estate of G. W. H., did, on or about the 31st day of December, 1850, make and execute the following notes which were signed by them as executor and executrix of the said estate;" [describing five several notes amounting to \$2,709;] "and whereas, four of the above notes amounting

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W. H. McNairy vs. John Thompson *et al.*


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to \$2.159, were given to the Planters' Bank, and the other note for \$550, was given to the Union Bank in renewal of notes made and drawn by (their testator) the late G. W. H., upon which we were endorsers, and which were then due and under protest; and whereas, it was at our request and for our especial benefit and accommodation that the said J. M. H. and M. H. consented to become the drawers of the above described notes; in view of the above facts, we, the undersigned do, by these presents declare, that we do not hold the said M. H. and J. M. H. personally responsible or bound, and we do hereby release them from all *personal* obligation to pay said notes, and will not look to them for the payment of the same, any further than the said estate may be able to pay:" *Held*, that said instrument, in its legal effect, is a covenant to indemnify J. M. H. and M. H. against personal liability, and to prevent their suffering loss or damage in consequence of having become makers of the several notes therein specified; and that from the situation of the parties at the time of its execution, the motives which prompted it, and the end to be effected by it, it imports an absolute engagement on the part of the covenantors to "release" and exonerate the covenantees from the payment of said notes except so far as the assets of the estate in their hands might, in due course of administration, enable them to pay; and that said covenant was broken the instant the covenantees became liable to pay the notes.

4. PLEADING. *Joinder by plaintiffs in action of covenant.* When a covenant to indemnify against the payment of a debt, is made to two or more persons jointly, all must join in an action upon it, and the failure to join would defeat the action, although they may have severally paid the debt, and out of their separate funds in equal or unequal proportions.
5. EVIDENCE. *Husband and wife. Money paid by husband, for wife dum sola.* Where M. H., a *feme sole*, had become bound to pay the debt of another, which was paid by J. H. in contemplation of marriage with the said M. H., and after marriage they bring their joint action to recover back the money so paid, it must be shown, in order to entitle them to recover in said action, that the payment so made on account of the wife, was made at her request, or with her knowledge and consent. The want of proof in this respect cannot be supplied by inference from the fact of their marriage soon after said payment.

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FROM DAVIDSON.

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This was an action of covenant in the circuit court of Davidson county, brought by John Thompson and his wife, Mary, (formerly Mary House,) and James M. Hamilton, against Wm. H. McNairy and M. Hamilton,



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upon an instrument under seal, executed on the 4th of January, 1851, by said McNairy and M. Hamilton to said James M. Hamilton and Mary House, as executor and executrix of the last will and testament of Geo. W. House, deceased. The covenant sued on is sufficiently quoted in the above abstract, No. 3. It appears that in the year 1850, Geo. W. House died, leaving a last will and testament, in which Jas. M. Hamilton and his widow, Mary House, were appointed executors. At the time of his death he was the maker of several notes in the Planters' and Union Banks at Nashville on which said McNairy and M. Hamilton, then constituting a firm of merchants in Nashville, under the style of McNairy & Hamilton, were first endorsers. When these notes fell due, there being no money in the hands of the executors, they were severally protested for non-payment. McNairy & Hamilton requiring considerable accommodations from these banks, and being unable to procure any whilst they were under protest, were anxious to have the notes renewed, and persuaded the executors to execute new notes in their own names as executors, which should be endorsed by McNairy & Hamilton, and substituted in lieu of the old notes. The executors refused to do so until they were advised that they would not, in so doing, render themselves personally responsible, exacting a pledge from McNairy & Hamilton, that if they should be deemed or held to be personally liable, they, McNairy & Hamilton, would give them a written indemnity.

In a few days after the signature of the notes, the executors becoming satisfied that they had rendered themselves individually responsible, applied to McNairy &

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Hamilton for their indemnity, who, on being reminded of their promise, signed and delivered to the executors the covenant which is quoted above. Before these notes became due the executors discovered that the estate of George W. House was insolvent, and they filed their bill accordingly, suggesting its insolvency, which was still pending and undetermined in the chancery court at Nashville, no dividend having been declared at the termination of this law suit in the circuit court. The notes fell due, were protested, suits brought on several of them and judgments rendered against Jas. Hamilton and Mary House individually. Before these judgments and notes not sued on, were satisfied, John Thompson and Mary House agreed to be married, and a day or two previous to the marriage, and perhaps in view of that relation, John Thompson paid off one of the judgments, but it does not appear that said payment was made with the knowledge and consent, or at the request of Mary House. After the marriage, Jas. Hamilton and John Thompson each paid their half of the debts, in unequal parts, and then, on the 2nd of September, 1852, instituted separate suits in *case*, against McNairy & Hamilton. At the return term of the writs the counsel for Jno. Thompson and wife moved to change the nature of their action to covenant, and add the name of Jas. Hamilton as co-plaintiff, which was accordingly done. The declaration contains two counts. One of which declares upon the covenant as if executed simultaneously with the signature of the notes, and alleges the general breach. The other goes on the moral obligation of a simultaneous promise, and then states the subsequent execution of the covenant in performance of it.

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Previous to the jury trial, M. Hamilton, one of the original defendants in the suit, and partner of McNairy, entered confession of judgment for the damages against him. He was then offered as a witness on the jury trial, and objected to by the counsel of McNairy; the objection was overruled, and he then proved the inducement to the covenant, and the previous *parol* promise on the part of McNairy and himself. There was a verdict and judgment for the plaintiffs at the June Term, 1853, of said circuit court, (Hon. N. BAXTER, presiding,) from which defendant McNairy prosecuted a writ of error to this court.

WASHINGTON, for plaintiff in error, with whom was HOUSTON, who said:

1. If any suit can be sustained against defendant, on the paper, it cannot be joint. Thompson paid a part of the money and James M. Hamilton paid a part, but they paid unequal parts. If the paper sued upon is a covenant of indemnity, then the damage to Thompson, by its breach, is no damage to Hamilton, and *vice versa*. They have no interest in each other's rights. There is error in the charge on this point in the cause.

2. There is error in the charge in relation to the sum paid by Thompson before his marriage. It is based upon a state of facts that had no existence. The question of fact was left to the jury to presume it without any proof. There is no proof that Thompson paid the \$677 at the instance or request of Mrs. House.

3. There was error in admitting Mortimer Hamilton as a witness. He had confessed judgment and fixed his own liability to plaintiffs, and he was directly interested

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in fixing the same liability upon McNairy. He is interested to relieve himself of part of the debt for which he has confessed a judgment, by charging it on the defendant. 1 Greenl. Ev., p. 497-8. 12 Ohio R., 275. *Foster vs. Hall & Eaton*, 5 Humph., 346.

4. There was error in the admission of Hamilton's testimony, because the testimony itself is incompetent. Its effect is to vary the terms of the written contract.

ANDREW EWING, for defendants in error, said:

The covenant on the part of McNairy & Hamilton was one of indemnity except so far as they might be in possession of assets of the estate of George W. House, applicable to these debts. This construction is deduced from the situation of the parties previous to the execution; the motives for its execution as recited on the face of the paper itself, and the obligatory words used in its conclusion.

Previous to the signature of the new notes, James Hamilton and Mary House were not individually liable for one cent, and could not have become so unless by fraud or mismanagement in their executorship, whilst in their present attitude, according to the construction of the counsel for the plaintiff, they lose all they have paid except what is received from House's estate. On the other hand, if things had remained as they were, McNairy & Hamilton would have lost all except what they derived from House's estate, whilst now, McNairy claims that they are entirely exonerated from any loss, and this, he insists, was in the view and mind of the parties at the inception of the contract. For the law on this branch of the question, see Chitty

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on Contracts, p. 75, and notes. The motives for the execution of the new notes is stated on the face of the covenant and proved aliunde; they were solely for the benefit of McNairy & Hamilton, to *relieve their credit in bank and prevent their suspension of business*. That recitals are always to be looked to in cases of doubt as to construction of contracts, and at the time absolutely control it, see Chitty on Contracts, pp. 86 and 89. The obligatory words are, "we do not hold them personally responsible or bound on the notes, and we release them from all personal obligation to pay the same, and we will not look to them for payment of the same further than the estate can pay." Now, what is the meaning of these phrases? Is it, that if McNairy & Hamilton ever paid these notes they would not look to Hamilton and House for repayment; why, no such contingency could ever arise if the makers remained solvent, and if they became insolvent then their subsequent liability to McNairy & Hamilton would be unimportant. We are placed then, by this supposition, upon the absurdity of supposing that all parties thought the endorsers must pay the notes before the makers, and yet they are also cognizant that the makers would then be liable to the endorsers, and they are providing by covenant against the secondary liability. Surely this construction is inadmissible, and the true meaning is that McNairy & Hamilton exonerated the executors from all responsibility.

I insist that Hamilton was a competent witness in this case. He had confessed judgment, and was no longer liable to any bias or interest. If the plaintiff was cast in the suit it had no effect on the liability of McNairy to the witness for contribution. He was no

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party to the suit, and therefore could not be estopped. If the plaintiff recovered against McNairy it would not affect the witness's liability, for the whole amount might have been collected of him, if able, and he put to his recourse against McNairy, or, if collected of McNairy, he, McNairy, could then have his recourse against witness. For the law on the subject, see §§ 399 and 400, 1 Greenl. 2 Humph. 106. I insist further, that there was no necessity for the testimony of Hamilton, and that the charge of the circuit judge on that point was wrong, we were entitled to a recovery on the first count of the declaration. For, when a contract of guaranty is under seal there is no necessity for an allegation or proof of consideration. See 24 Wendal, 256.

That a consideration in any sealed instrument may be proved by parol on the face of the paper, or that point contradicted in the same way, is now universally admitted, and the exact question in this case as to the relevancy and effect of the testimony of Hamilton, is decided in 6 Yerger, 418. Chitty on Contracts, 52 and 500.

In regard to the joinder of plaintiffs in this case, that was inevitable; they could not split their cause of action and sever in their suits when the covenant was joint, although their payments were necessarily separate. See Chitty on Pl., 8, and notes.

McKINNEY, J., delivered the opinion of the court.

The assignment of errors in this case, presents various questions for our consideration.

1. It is argued, that his Honor, the circuit judge, erred in construing the instrument declared on. This

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proposition assumes that the instrument upon its proper construction, contains no covenant to indemnify or to save harmless the covenantees against the payment of the notes to the banks, who were the holders thereof, but merely that the covenantors as endorsers of said notes, would not, in the event they should be first compelled to pay said notes, seek to hold the makers liable further than the assets of the testator's estate, in their hands as Executors, would enable them to pay.

The instrument is inartificial in its language, and if the operative words used in the latter clause, were alone looked to, the construction contended for by the counsel of the plaintiff in error, would not be without plausibility; but in looking to the whole instrument, we are very clear that such is not the true construction of the agreement.

The rules and principles laid down for the exposition of contracts, have, for their sole object, "to do justice between the parties, by enforcing a performance of their agreement, according to the sense in which they mutually understood it at the time it was made." Chitty on Con., 73. The intention is the governing principle of construction. In ascertaining the intention, the situation of the parties, the motives that led to the agreement, and the objects designed to be effected by it, may all be looked to by the court. *Ibid* 74, note 2.

The construction must be upon the entire instrument, so that one part may help to expound the other. And in the construction of a deed or other instrument, the *recitals* may be looked to and used to explain a doubt as to the meaning and intention of the parties. 1 Spen. Eq., Jur., 528, 535. "If, by a particular construction,

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the stipulation of the party would be frivolous and utterly ineffectual, and the apparent object of the contract in reference to its subject matter would be frustrated; but a contrary exposition, though *per se*, the less appropriate, looking to words only, would produce a different effect, the latter interpretation shall be applied to the agreement if it can possibly be supported by any thing in the contract, or the nature thereof." Chitty on Contracts, 80.

No particular form of words is necessary to make a covenant, but any words which manifest the intention of the parties in respect to the subject matter of the contract, are sufficient. Bac. Abr. Covenant. A. Com. Dig. Covenant, A. 2. Lebr., N. P., 469. 3 John. R., 44.

Applying these principles to the case under consideration, the conclusion is inevitable, that the instrument declared on, in its legal effect, is a covenant to indemnify the defendants in error against a personal liability, or in other words, to prevent their suffering loss or damage in consequence of having become the makers of the several notes specified in said instrument. Looking to the situation of the parties at the time of the agreement, the motives which prompted it, and the end to be effected by it, no other sensible meaning can be given to it.

It is shown by the *recitals* of the instrument, that no personal liability whatever, rested upon James M. Hamilton and Mary House, as executors, in reference to the pre-existing notes, which were under protest, made by the testator, and of which, McNairy and M. A. Hamilton were first endorsers. And on the other hand, it is apparent that McNairy and Hamilton, as endorsers, had



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become fixed with a liability from which there was no escape in any event.

No motive or reason, consistent with our experience, can be imagined why the executors, in the then doubtful condition of the estate, and which very shortly afterwards proved to be insolvent, should consent to incur personal liability for so large an amount without consideration, and with no indemnity. Such a conclusion is utterly irreconcilable with, perhaps, the most universal and urgent principle of human action, self interest. But we can easily perceive, from the facts recited in the instrument, a reasonable and adequate motive on the part of the endorsers, for soliciting the executors to enter into the arrangement. The endorsers were inevitably liable to the payment of the protested notes, and subject to bear the loss personally, except so far as the assets of House's estate might turn out to be sufficient to reimburse them.

As a mercantile firm in Nashville, their credit was likely to be ruinously affected by the dishonor of their paper; hence, it was equally important for them to remove the suspension of their credit in the banks, and to procure time for the payment of the debts.

In putting the executors forward to execute new notes, in renewal of those under protest, the endorsers were effecting a most important object, the sole benefit of which enured to them personally, and therefore they might well undertake that the executors, in doing so, should be subject to no hazard of personal loss.

In thus undertaking to indemnify the executors, the endorsers, while securing to themselves an important benefit, were taking upon themselves no greater or dif-

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ferent liability, than that with which, by law, they already stood charged.

The instrument, it is true, is less artificial and explicit in its expression than it might have been, but the intention is sufficiently apparent. It imports an absolute engagement on the part of McNairy and Hamilton to "release," or exonerate the executors from the payment of said notes to the banks, except so far as the assets of the estate in their hands, might, in the due course of administration, enable them to pay.

And this covenant was broken the instant the executors were left to make payment of these notes to the banks. The covenantees cannot resist a recovery in the present action on the ground that the ability or inability of House's estate to discharge these notes, in whole or in part, has not yet been ascertained. The administration of the estate having been referred to a court of chancery, the defendants must have recourse to the assets, if any there be, in the regular mode.

2. In the progress of the cause, the defendant, Hamilton, confessed judgment for the damages sought to be recovered, and in the trial of the issues as to the defendant, McNairy, was offered and examined as a witness on behalf of the plaintiffs, for the purpose, mainly, of establishing the consideration upon which the covenant was founded. This was objected to, and is now assigned for error.

This proceeding, though irregular, constitutes no error respecting the merits. Generally speaking, a contract under seal imports a consideration, and therefore, no averment, or proof of a consideration was requisite to be made. But, if it had been required to show a conside-

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ration, it is sufficiently apparent upon the face of the instrument. The issue and proof upon this point, being wholly irrelevant and immaterial, cannot, in this court, be made a ground of reversal.

3. It is said, that as the notes, except one, were paid equally by Jas. M. Hamilton and John Thompson, after the marriage of the latter to Mrs. House, each paying his own money, that each should have sued separately, and that a joint action will not lie in such case.

This proposition is clearly untenable. The covenant being made to two persons jointly, they must be joined if living, and the failure to join would defeat the action, although they may have severally paid the debt, and out of their separate funds, either in equal or unequal proportions. 6 Wend., 629. 3 Cowen R., 142. Chitty on Pl., 8. How the law upon this point, in an action of assumpsit for money paid, may be, we need not now enquire.

4. It is proved by Mr. Ewing, that on the 22d of October, 1851, John Thompson, one of the plaintiffs, "gave him six hundred and seventy-seven dollars to be paid to the Union Bank in extinction of the judgment of said bank," upon one of the notes specified in the covenant declared on. And it is also proved that this transaction took place on the day preceding the marriage between said Thompson and Mrs. House. For this sum there was a recovery in this case, as well as for the several amounts paid in discharge of the other notes described in this covenant.

It is said, that as to this payment on the 22d of October, 1851, there is no evidence to support the verdict, and so we think.

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It is certainly true, as argued, that if Thompson paid the money at the request of Mrs. House, and for her prior to the marriage, it might well be recovered in the present action. But there is no evidence whatever, in this record, that the money was paid to Mr. Ewing for Mrs. House, or at her request, or even with her knowledge; and this want of proof cannot be supplied by inference from the fact of the marriage between Thompson and Mrs. House on the following day. The character of the transaction, as well as the legal effect, must be judged by the state of facts existing at the time of the payment. And it is clear, upon the proof before us, that if the marriage had not followed, Thompson would have had no pretext for claiming to recover for this payment, against Mrs. House.

For aught that appears, it was merely an officious, voluntary act, wholly incapable of creating the relation of debtor and creditor between them.

Upon the last ground alone, the judgment must be reversed, and a new trial granted.

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Z. Thomasson's *lessee* vs. L. Keaton.

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Z. THOMASSON'S *lessee* vs. L. KEATON.

1. **LIMITATION.** *Seven years' possession by judgment debtor, holding at the time of sheriff's sale. Offer to redeem. Act of 1819, ch. 28, § 2.* A mere offer to redeem, or to purchase in the outstanding title to land sold at execution sale, made by the judgment debtor suffered to remain in possession, after his possessory right has been acquired and perfected by operation of § 2, of the act of 1819, ch. 28, will not destroy the possessory right which had previously ripened into a fixed legal title.
2. **EJECTMENT.** *Same. Effect of execution sale in divesting title. Act of 1819, ch. 28, § 2. To what extent possession of judgment debtor protected.* In an action of ejectment for land bought by the plaintiff at execution sale, sold as the property of the judgment debtor and defendant in ejectment, who relies upon his seven years' subsequent adverse holding as a defense to such action, he cannot by virtue of the act of 1819, ch. 28, § 2, be protected in such possession to the extent of the boundaries of said land as he held it under his title prior to such execution sale, but only to the extent of his actual enclosures. The execution sale divested the defendant of all title, and his possession after the sale was that of a tenant by sufferance, which could only be protected to the extent of his actual enclosures, as they existed for seven years prior to the institution of the suit in ejectment.

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FROM CANNON.

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This is ejectment from the circuit court of Cannon county, in which the plaintiff claimed as purchaser at execution sale. The plaintiff in ejectment recovered a judgment against the defendant on the 18th of January, 1839, in the circuit court of Cannon, upon which execution was issued, and levied on the tract of land in this controversy. The land was sold by the sheriff under said execution on the 12th of May, 1840, and purchased by this plaintiff, the judgment creditor, to whom the sheriff's deed was executed on the 23d of December 1844. Keaton, the judgment debtor, and defendant in ejectment, was in the actual possession of

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the land at the time it was levied on and sold, and had so continued ever since, claiming to hold for himself. This action of ejectment was commenced on the 15th of September, 1848, and it seems in the spring of 1848, Keaton offered (as was alleged) to redeem the land from the purchaser and plaintiff in this action. The tract of land contained about two hundred acres, only seventy of which were enclosed, and all of which Keaton had been in possession of for a period of about twenty years before and after the levy and sale. The defendant relied upon the statute of limitations, and the plaintiff set forth the offer to redeem in the spring of 1848, (but did not sufficiently prove the same,) as a recognition of his superior title by the defendant. There was a general verdict and judgment in the court below, at the October Term, 1853, in favor of the defendant, (Judge DAVIDSON, presiding,) from which the defendant appealed in error to this court.

BURGER, for plaintiff in error, with whom was G. W. THOMPSON, who cited and commented upon *Mitchell* vs. *Lipe*, 8 Yerg., 182, and 1 Swan, 312.

READY, FARE and E. H. EWING, for the defendant.

McKINNEY, J., delivered the opinion of the court.

This case is upon a question arising upon the statute of limitations. The error relied upon is in the charge of the court.

We think there is no just ground of exception to the instruction, supposed to be erroneous. The ques-

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tion is not properly raised by the proof in this record, as to what would be the legal effect of *an offer to redeem*, made by the judgment debtor (suffered to remain in possession) to the purchaser, after an adverse possession by the former, of more than seven years from the date of the sheriff's sale. The proof does not sufficiently establish the fact of such an offer to redeem. But even if it did, it is clear, that after a possessory right has been acquired and perfected by operation of the second section of the act of 1819, the mere offer to redeem, or rather to purchase in the outstanding legal title, (for this would be more properly the nature and effect,) could not be considered as sufficient to destroy the possessory right, which had previously ripened into a fixed legal right.

If there be error in the charge it is in a part not complained of, and is this: The Court, after instructing the jury that the relation between the judgment debtor, (suffered to remain in possession after a sale of his land by the sheriff,) and the purchaser at such sale, was not the relation of landlord and tenant, in the technical sense of the term, proceeded to state, that the "inquiry in such case is, did the execution debtor continue to hold the land as before, in opposition to the purchaser? If so, a holding for seven years protects him in his possession of the same land which was pronounced to be his when sold by judgment and execution against him."

This instruction probably led the jury to the conclusion that the defendant was protected by the second section of the statute, not merely to the extent of his actual enclosures, but to the entire extent of the boun-

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daries of the title under which he held the land prior to the execution sale, and induced them to find, as they did, a general verdict for the defendant. This was clearly wrong. By the execution sale the defendant was divested of all title to the land sold. His possession after this sale, was that of a tenant by sufferance, without color of title; and consequently his possession was protected only to the extent of his actual enclosures; that is, his enclosures as they existed for the period of seven years before the commencement of the present action.

The judgment will be reversed, and the case be remanded for a new trial.

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NOTE.—It will be seen by reference to 2 Swan, 138, that this case has heretofore been before this court, and was adjudicated upon the question of the statute of limitations as a defense to the action.—REF.

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JOHN W. BRIGHT vs. WILLIAM MCKNIGHT *et al.*

1. **GUARANTY.** *Notice to guarantor.* An absolute present guaranty, complete in its terms, and fixing the liability of the guarantor, takes effect from the moment it is acted on by the guarantee; and no notice to the guarantor of the acceptance on the part of the guarantee is necessary to fix the liability. Thus, where on a written contract of general agency for the sale of books, the agent contracts for a consideration stated therein, to sell said books and pay to the principal his proportion of the proceeds of such sale, and the guarantors execute thereon their guaranty in these words: "We guaranty to —— [the principal] that the above named —— [the agent]



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will well and truly perform all his above and foregoing undertakings pursuant to the tenor and effect of the said contract ;" such guarantors are not entitled to notice of the acceptance of said guaranty, but were bound, in default of said agent, for all the books delivered to him under said contract according to the tenor thereof, from the time said principal begun to act upon such guaranty, and continued so bound until notice to said principal that they would be no longer bound.

2. *SAME. Rule of construction and reason of the rule.* The rule of law governing the construction of undertakings in the nature of a guaranty, is, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit. The observance of this rule is important to the trade and enterprise of the country, which in the main, depend upon a combination of the labor and energy of those who have not means, with the credit of those who have ; and the more difficult it is rendered by complicated rules to make these instruments available, the less confidence will be reposed in them, and the credit and encouragement they afford to enterprise and industry, will be, in a great degree, withdrawn. There is no hardship in such a doctrine, as it is in the power of the guarantors to make their obligation dependant upon any condition they see proper.

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FROM LAWRENCE.

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The plaintiff in error, a citizen of the city of Louisville, Ky., entered into a written contract with one Jas. H. Moore, by which said Moore became the general traveling agent of the plaintiff in error, for the sale of certain books described in said contract, which were to be shipped to said Moore in North Carolina, and sold there or wherever else said Moore might be able to sell them. Under the contract, Moore was to receive a portion of the proceeds of the sales, and to remit the balance to the plaintiff in error at Louisville. It was understood also between the parties, that Moore was to procure guarantors for the faithful performance of said agency, and to that end the plaintiff in error wrote upon the paper containing the contract, the following instrument, to which Moore agreed to procure

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the required signatures, and forward the same to the plaintiff in error at Louisville: "We guarantee to John W. Bright that the above named James H. Moore will well and truly perform all his above and foregoing undertaking, pursuant to the tenor and effect of said contract." This was signed by the defendants and enclosed in a letter to the plaintiff in error, in which Moore uses these words: "Enclosed you will find our contract, signed as requested." Upon receipt of the instrument the plaintiff in error commenced shipping to Moore the books mentioned in the contract, and which Moore appears to have received to the amount of near \$1,000, many of which appear to have been sold by him, but none paid for. It does not appear that any notice was given to the defendants of the acceptance of the guaranty by the plaintiff in error. After waiting for several years in vain for remittances from Moore, the plaintiff in error came down to the county of Lawrence where the guarantors resided, and demanded payment of them, which being refused, he instituted in the circuit court of said county, this action on the case upon the guaranty. At the October Term, 1853, of said court, the cause was submitted to a jury, when there was a verdict and judgment for the defendants, from which the plaintiff appealed in error to this court. The part of the charge of the Court, (Judge WALKER,) to which exception was taken, sufficiently appears in the opinion.

ROSE and TINNON, for defendants in error:

The right of the plaintiff to recover fails him upon the following grounds:

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It will be observed that this guaranty is collateral in its character, that being the force of the words, "we guaranty," as well as the intention of the parties. To make this conclusive it need only be borne in mind that the contract is entirely prospective in its operation, depending altogether upon future contingencies, unlimited as to the time when, and the amount of books, were to be sent to Moore. In fact, other contracts are contemplated, and books are to be sent and sold in other States as Bright and Moore may agree. We think this guaranty cannot be regarded in any other light than as merely a general letter of credit to Bright. The courts constantly draw a very clear distinction between guaranties of this kind, and those upon fixed and certain liabilities already incurred, where the guarantors know precisely what they agree to pay. The cases cited by plaintiff's counsel will be found to be of this character.

Then, we contend, first, that to entitle the plaintiff to recover he must aver and prove notice to the guarantors, in a reasonable time, of his acceptance of their guaranty, and his intention to act upon it. That this notice of acceptance on the part of the plaintiff is an absolute condition antecedent to any legal operation of the guaranty; and it must appear that the same was given before any responsibility can attach to the guarantors under the guaranty.

This point is well settled in many adjudications by the highest authority. The doctrine is discussed in the case of *Douglass vs. Reynolds*, 7 Peters, 113-127, and again in the same case in 12 Peters, in which Mr. Justice Story declares the law in substance, as above

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set forth. The same point is affirmed in *Bradley vs. Carey*, in 8 Greenl., 234, S. P. *Adcock vs. Fleming*, 2 Dev. & Battle, 225. *Clark vs. Russell*, 7 Cranch, 69-92. Marshall C. J., in *Edmonson vs. Drake*, 5 Peters, 624, and *Wilds vs. Savage*, 1 Story, 22. In the case of *Lee vs. Dick*, which went up to the United States Supreme Court from West Tennessee, the Court says: "When the guaranty is prospective and to attach upon future transactions, and the guarantor uninformed whether his guaranty has been accepted and acted upon or not, the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable." 10 Peters, 48-452.

We are aware there may be cases where the guaranty is of a specific existing demand by a promissory note, or other evidence of debt, where the guarantor knows precisely what he guaranties, and the exact extent of his liability, that no notice is necessary, because it would be useless; *Lee vs. Dick*, 10 Peters. But the Court says that doctrine was not applicable to that case, neither can it apply to this by any sort of construction of that contract.

Second: To entitle the plaintiff to recover, this being a continuing or standing guaranty, and prospective in its intention, under which an indefinite number of shipments were to be made to Moore, in the future, the plaintiff, Bright, must aver and prove notice to the guarantors, of the fact, when the transactions between him and Moore were closed, and of the nature and amount of their liability under the guaranty.

This doctrine is declared in several of the cases before referred to, both by Story and Marshall; but the

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case of *Douglass vs. Reynolds*, 7 Peters, 113-127, may suffice, under the third instruction asked for in that case in the court below.

These are the cases relied on in the court below, and we think there can be no error in the charge of his Honor, the circuit judge. That being so, the finding of the jury is correct.

M. S. FRIERSON, for the plaintiff in error, said:

1. We admit there is a class of cases which decide, and decide correctly, that a mere letter of credit, or offer, or proposition to guaranty the performance of a contract thereafter to be made and entered into, is not binding upon the guarantor until accepted, and notice of the acceptance given. 10 Peters, *Lee vs. Dick*, 482, 474-5. 15 Con. R., 206 to 17. *Douglass et al. vs. Reynolds et al.*, 7 Peters' Rep., 113. *Wilds vs. Savage*, 1 Story's R., 22. *Adams vs. Jones*, 12 Peters' R., 207. 4 Greenl., R., 526. Story on Con., § 873.

2. If the proposition comes from the guarantee, as in this case, and the same is accepted and entered into by the guarantor, it constitutes a good and binding guaranty, without any notice of acceptance from the guarantee, because there is in such a case, a meeting of minds, and a perfect agreement and contract is entered into. *Phillon vs. Van Meirass*, Burrow's Rep., 1663. Hol. L. C., 194, 195. *Calhoun et al. vs. Dawson*. 4 Eng. L. and Eq. R., 378. Story on Con., § 384, *et seq.*

3. A guaranty of a contract, the terms of which are all agreed upon between the parties at the time of executing the same, is binding as an actual present

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guaranty, and requires no notice of acceptance. *Lee vs. Dick*, 10 Peters' R., 482-495. 15 Con. R., 406, 414. *Wilds vs. Savage*, 1 Story's R., 22. *Brud vs. Hillboon*, 7 Con. R., 523. *Whitney vs. Grool*, 24 Wend. R., 82. *Jackson vs. Loudes*, 7 Blackf. R., 526. 2 Bouv's. Inst., p. 56. *Vanleer vs. Crawford*, 2 Swan.

4. But suppose the Court should be of opinion that this guaranty belongs to that class of cases which require notice to be given to the defendants before they are bound by it, still, in this case, it is clear that the defendants knew it was accepted and acted upon by the plaintiff. The principal, Moore, and these guarantors, lived in the same town. Moore was also living in the house of one of the guarantors at the time, and continued to live there until after the first lot of books was delivered. They furnished him a carryall to take them off; and McKnight's letter to Garvin shows they knew all about the plaintiff's acting under this guaranty; and Moore's letter to Bright says, "you will find our contract enclosed, signed as requested." And an acceptance and notice thereof, may be established as well from circumstances as direct proof, and so the court told the jury, and their finding for the defendants is against both the law and evidence in the case. 15 Conn., 206, 457. 2 Am. L. C., 70-2.

CARUTHERS, J., delivered the opinion of the court.

This is an action on the case upon a written guaranty.

In 1847 James M. Moore entered into a written contract with the plaintiff, to act as general agent in selling "Bright's Family Practice" and "Parley's An-

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nuals," in the State of North Carolina or any other part of the country. He bound himself to pay to the plaintiff three dollars for each volume of the first named work, and seventy-five cents for the second, that might be furnished him, and not to sell the said works higher than five dollars for the former, and one dollar and twenty-five cents for the latter, per volume. The difference between the two sums was to be his profit and compensation. The plaintiff was not willing to trust Moore, but required of him responsible sureties, and wrote upon the back of the contract between them the following guaranty, which was to be signed by solvent men and returned to him by Moore: "We guaranty to John W. Bright that the above named James H. Moore will well and truly perform all his above and foregoing undertakings, pursuant to the tenor and effect of said contract." This was signed by the defendants and enclosed by Moore in a letter to the plaintiff at Louisville, Ky., in which he says, "enclosed you will find our contract, signed as requested."

Whereupon the plaintiff commenced delivering books to Moore at Lawrenceburg, Tenn., where the defendants resided, of which they had knowledge. Upon the failure of Moore to pay for the books, being irresponsible himself on account of insolvency, this action was brought upon the guaranty.

The question of law, made in the argument, is whether the undertaking of the defendants was of such a character as to bind them, without notice of acceptance by the plaintiff?

Upon this point the circuit judge charged the jury, "that the paper read in evidence as the foundation of

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the action, did not, on its face, purport to be an original or absolute undertaking, but that it was a collateral or conditional undertaking on the part of the defendants, that they have bound themselves as guarantors that Moore would perform his contract with the plaintiff," and that, in such case, the liability of the guarantors could only be fixed by notice from the plaintiff, "that he had accepted the guaranty and would act upon it."

He gives cases in which acceptance and notice might be presumed. But the case must turn upon the correctness of the legal proposition so distinctly announced to the jury, and which must have controlled their verdict.

We cannot concur in the construction and effect given by his Honor to the instrument in question, from which the necessity of notice of acceptance to the guarantors, in order to bind them, is made to result as a consequence.

This branch of the law came up and was considered by us at last term, in the case of *Vanleer vs. Crawford*, 2 Swan, 117. That case was elaborately discussed, and involved, as it was argued, the whole doctrine on this subject. But, inasmuch as we considered that notice of acceptance was in effect, if not in fact, given to the guarantor, there was no express decision of the exact point now presented, and on which this case must turn.

In that case, however, it is said, "that if the case depended alone upon the original guaranty of the 26th of January, 1849, which was enclosed in a letter from the plaintiff in error to Lanier, it might be very plau-



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sibly maintained, upon the construction of that instrument, that any person who hired slaves to Lanier, pursuant to its terms, and upon its faith, might support an action against the guarantor, without showing any thing more than simply that he had acted upon it."

That instrument was in these words: "I do hereby guaranty the payment of any contract that Sam Lanier may make for the hire of negroes during the year 1849, to be used at his iron works or any iron works in which he may be interested in Decatur or Perry county, Tennessee."

If that would have been held to be obligatory without notice of acceptance, as was clearly intimated, if the case had required it, there can surely be no doubt about the case now before us. We are aware, as stated in that case, of the great and irreconcilable conflict of the most respectable authorities upon this question. Some of them, both English and American, and among others, the Supreme Court of the United States, in *Douglass vs. Reynolds*, 7 Peters, 113, seem to have established the doctrine, that the liability of guarantors, depends upon principles analogous to those which apply to endorsers; and that the principles of commercial law so far apply as that notice, or at least, knowledge of the acceptance of the guaranty, and the demand upon, and failure of the principal to pay, are conditions necessary to fix the liability of the guarantor. On the other hand, there is a strong current of authorities, both here and in England, holding the true doctrine to be, that "an absolute present guaranty, complete in its terms, and fixing the liability of the guarantor, takes effect as soon as it is acted upon. 2

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Bouv. Inst., 56. Amer. Leading Cases, with Hare & Wallace's notes, 2 vol., 83 to 100; where the cases are collected.

We think this latter doctrine is based upon sounder reason, and better calculated to effectuate the true meaning and understanding of the parties, and accomplish the ends of justice.

These instruments are extensively used in the commercial world, and large credits and advances are made upon the faith reposed in them, in the various forms which they assume, as letters of credit, guaranties, &c.

It is important to trade and enterprise, which very often, if not most generally, depends upon a combination of the labor and energy of those without means with the credit of those who have them. The more difficult it is rendered to make these undertakings available, by complicated rules of notice, demand, &c., the less confidence will be reposed in them, and the credit and encouragement they afford to the enterprising and industrious, will be in a great measure withdrawn.

In pursuance of this view, it was decided by the Supreme Court of the United States in *Drummond vs. Prutman*, 12 Wheaton, 515, that a guarantor shall be held bound to the full extent of what appears to be his engagements, and the rule in expounding these undertakings is, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit. Fell on Guaranty, ch. 5, p. 127. 12 East, 227.

No injury can result from this doctrine, as it is in the power of guarantors to make their obligation de-

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pendent upon notice, demand, or any other condition they see proper, for their own protection and safety.

It would be difficult to select words, more direct, positive and unconditional, than those used in the present case. The contract of Moore was before them, set out in all its terms, and their undertaking written upon it with express reference to its contents.

It is then, an absolute present guaranty, complete in its terms, and took effect as soon as it was acted upon by the plaintiff, to the extent of all the books delivered and not accounted for by Moore. It was not limited to any particular number of books, or books to be delivered in any specified time, so as to make it a limited guaranty, but it extended to all that might be delivered under that contract, and was therefore, what is called a continuing guaranty. In such a case, the defendants would be bound until they gave notice to the plaintiff that they would be no longer liable.

We held at the present term, in the case of *White vs. Stacker*, that the defendant was bound without any notice, upon this instrument: "High Point, Ky., Jan. 22, 1848. To all whom this may concern. This is to certify that I have agreed to go Dr. J. B. Williams' security for the hire of all the negroes he may be able to obtain by this letter of credit, for the year 1848. Said hands to be employed at West Point Furnace, Decatur county, Tenn. JOHN STACKER."

Upon the faith of this guaranty, or letter of credit, Williams hired negroes of Jonathan White, and executed his note with John Stacker, guarantor. No notice was given to Stacker by White of the acceptance of the guaranty. Williams failed, and Stacker was sued

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by White. We held him liable by his guaranty. The case before us must be governed by the same principle.

The instructions then, given by his Honor to the jury, in the interpretation and construction of the instrument sued upon in this case, were erroneous; and for this the judgment will be reversed, and a new trial be granted.

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JAMES BROWNLOW vs. MARTIN JONES.

**LIMITATION.** *Actions on the case for libel.* An action on the case for libel, is, by the statute of limitations of Tennessee, barred after three years from the publication of said libel.

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FROM GILES.

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This is an action on the case for libel, brought by Brownlow against Jones in the circuit court of Giles, where at the December Term, 1853, (MARTIN, Judge, presiding,) there was a verdict for the defendant, from which the plaintiff appealed in error. It was submitted as an agreed case to this court upon the question of the statute of limitations, under the following agreement, signed by the counsel respectively: "It is agreed by the parties on both sides, that if, for an action for libel the statute of limitations is three years or a longer

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time, then this cause shall be reversed and remanded for a new trial; but if the statute of limitations for actions of libel is for a shorter time than three years, then this cause shall be affirmed."

JONES and WALKER for the plaintiff.

M. S. FRIERSON, ELDRIDGE and LESTER, for the defendant.

CARUTHERS, J., delivered the opinion of the court.

This is an action on the case for libel, or written defamation.

By the agreed case, a single point of law is presented for our decision, and that is, whether the limitation of such action is three years or six months?

This must depend upon the proper construction of our act of limitations of 1715, ch. 27, § 5. C. & N., 439.

The words are, (so far as it is necessary for this enquiry,) "actions upon the case, actions of debt for arrearages or rent, actions of detinue, replevin and trespass *quare clausum fregit*, shall be brought within three years next after the cause of such action or suit, and not after; and the actions of trespass, assault and battery, wounding, imprisonment, or any of them, within one year. \* \* \* And the said action on the case for words, within six months after the ratification of this act, or within six months after the words spoken, and not after."

This act differs but little from that of 21 James I, ch. 16, § 3, and was doubtless copied from it with such

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changes as were considered proper by the Legislature, in view of the difference in the condition of the country and wants and interests of society in this and the mother country. The most prominent alteration is the shortening of the time for the bar of all actions. But the change in relation to this subject, consists in this, that the English act, in prescribing the time in which actions upon the case shall be brought, actions of slander are excepted, thus: "the said actions upon the case, other than for slander," to be brought in six years, and the said action on the case for words, within two years next after the words spoken, and not after;" whereas, in our act no such exception is made. Car. & Nich., 770.

It is said that this is an open question in this State, but that it came directly before the Supreme Court of Mississippi in the case of *Menter vs. Stewart*, 2 Howard, 698, and was distinctly decided in the opinion of that court, delivered by Chief Justice Sharkey: with every respect for the adjudications of that court and the able jurist who wrote the opinion, we cannot concur in it, unless it is founded on the peculiar phraseology of the Mississippi statute. That is copied, so far as this question is concerned, from the English act of 21 James I, except that the time is changed from two to one year. It will be observed that there is this striking difference between both the English and Mississippi statutes and ours, in this, they expressly except the action of slander out of the limitation for other actions on the case, and afterwards prescribe a limitation for that action. Our act of 1715 makes no such exception, but leaves the provision to operate upon all actions on the case, which

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of course, embraces actions for slander, as well verbal as written; and the time for the bar would be three years for any kind of slander if it were not for the exception made at the close of the section, of actions for words spoken, which are limited to six months. We think this distinction between verbal and written defamation is founded on good reasons. Actions for this offence, involving character as they do, generally stir up and excite families, and agitate and disturb the harmony of whole communities. They are only countenanced for the protection of character against the vile defamer, by holding over him the terrors of the law in its action upon his property, in the way of damages, and the exposure of his infamy by a public investigation, instead of leaving the injured party to avenge his own wrongs by personal violence, endangering the peace of society and the lives of citizens. For these reasons, the courts are opened to the injured party to pursue this peaceful remedy for the redress of his wrongs, and the punishment of the offender. But as slander by words spoken, is supposed to be less injurious to reputation on account of the excitement in which it generally originated, and the less permanent and enduring form in which it is propagated; and because it must be made out by the recollection of witnesses, it is proper to prescribe a shorter time for an action upon it, than where it is perpetuated by writing. In the latter case, there is no danger from time and the failure of memory, in making out the offense correctly. It does not rest upon the frail recollection and excited feelings of friends or foes, by which danger of perjury and injustice is created. It may also be remarked, that slander

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by words spoken is apt to gain immediate publicity, and reach the ears of the party injured, when written slander may be for a time concealed, and be so managed as not to come to the knowledge of the person slandered in so short a time. The wounds thus inflicted may be more lasting, as they are preserved and perpetuated in an enduring form, while defamatory words are easily forgotten, and are liable to pass off with their consequences, into speedy oblivion.

We think, then, that there are good reasons to suppose that a distinction was intended to be made between the two forms of slander, as to the time of limitation, and that the language of the act should have the plain, ordinary meaning of the words used, given to it.

In thus holding, we are not, as is the case under the Mississippi act, forced into the absurdity of deciding that there is no limitation for actions for written slander. That would have been the result there, of holding that the limitation was confined to cases of verbal slander, because all actions of slander were expressly excepted out of the bar prescribed for actions on the case generally, and the only limit at all upon suits for slander of any kind, was that for "words spoken." To avoid this apparent absurdity, the Court there was forced to hold, that unless the term, "words spoken," included also, "words written," there was no limitation of actions for the latter.

Judge Sharkey remarks in the case before cited, "either this section must apply to the case, or there is no limitation at all, for it is clearly excepted out of the operation of the fourth section," which prescribes the

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limitation for actions on the case, and excepts all actions for slander.

We are referred to several cases in the English Reports, and the opinions of elementary writers on this question, which conflict with the case relied upon in 2 Howard; but as our judgment is founded upon the peculiar provisions of our own statute, it is unnecessary here to notice them.

We are not called upon, under our act to resort to any forced construction of the language used by the Legislature, to avoid the novel conclusion that one civil action, and that for the worst of slander, is left without any limitation, which was the necessity forced upon the Court in Mississippi. Our act is plain, sensible and consistent. It fixes the limitation of all actions on the case at three years, with a single distinct exception of an action on the case for slanderous words spoken, or verbal slander, which must be brought in six months. There is, then, no conflict between us and the Supreme Court of Mississippi, as there is a substantial difference between our act and theirs.

The conclusion then is, that civil actions for a libel, or written slander, fall under the general limitation of three years, which applies to all other actions on the case, with the single exception above stated.

The judgment will be reversed, and the case remanded for a new trial.

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Red River Bridge Co. vs. Mayor and Aldermen of Clarksville.

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RED RIVER BRIDGE COMPANY vs. MAYOR AND ALDERMEN OF  
CLARKSVILLE.

**FRANCHISE. Contract. Constitutional law.** A grant by charter, from the Legislature, of an exclusive right to build a toll bridge within certain limits, although a contract, is such an exclusive right as must yield to the public interest, and the franchise acquired under it may be taken for the public use upon just compensation being paid therefor, without violating said contract or impairing its obligation in the sense of the constitution.

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FROM MONTGOMERY.

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In 1829 the Legislature granted to the plaintiffs the right to erect a bridge across Red river at the town of Clarksville, with the usual power to exact tolls of persons crossing the bridge, and stipulated in the charter that no other toll bridge should be at any time erected within one half mile of the plaintiff's bridge. The plaintiffs erected their bridge at the place designated in the charter, and continued to exact tolls of persons crossing it until the commencement of this suit. In 1847 the Legislature authorized the municipal authorities of the town of Clarksville to purchase the plaintiff's bridge, or to erect a free bridge near to the same. The corporation commenced building their bridge within a few feet of the plaintiff's bridge, whereupon he filed this bill in chancery at Clarksville, praying an injunction against the erection of said free bridge, and asking compensation for the damage sustained thereby. The Chancellor, (Judge BRIEN,) dismissed the bill, and complainants appealed to this court.

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Red River Bridge Co. vs. Mayor and Aldermen of Clarksville.

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HENRY & SHACKLEFORD, F. B. FOGG and KIMBLE, for complainants.

MEIGS and BAILEY, for the respondents.

McKINNEY, J., delivered the opinion of the court.

In view of all the facts of this particular case, we think the complainant is entitled to compensation as prayed in the bill. Whether or not the charter granted to the complainant contains the exclusive right alleged in the bill, and admitted in the answer; does not certainly appear, nor is it important to enquire how the fact is, with a view to the decision of the present case. For, assuming that it does, still we think it clear that such exclusive right must yield to the public interest. And, admitting the grant to be a contract, and that it is inviolable, yet to hold that the property or franchise acquired under it may be taken for public use "upon just compensation being made therefor," is not to violate or impair the contract, in the sense of the constitution.

The proof in this record establishes, that the bridge of the complainant was amply sufficient for the accommodation of the public, and that the sole and avowed object of the erection of a free bridge, within a few feet of the former, was to divert the whole travel from it, and thereby destroy its value, under a belief that the inducement held out to the public by a free bridge would greatly promote the local interests of the town of Clarksville.

It is manifest that the erection of a free bridge, under the circumstances of this case, amounts to a total

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destruction of the franchise granted to the complainant, in principle and in effect. The site and structure of the old bridge might as well have been taken and appropriated to the use of the new one; and, while we concede that this might be done, and likewise concede that the grant to the defendants must be regarded as sufficient evidence that the public interest required that it should be done; yet, we hold that it could only be done upon the condition of making "just compensation" to the complainant for the franchise thus destroyed.

It follows, therefore, that the defendants must account for the reasonable value of the complainant's bridge at the time of the completion of the free bridge.

The decree will be reversed, and an account ordered.

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JOHN MASON VS. SAMUEL VANCE.

1. EVIDENCE. *In an action for replevin against officer for property taken under execution.* When a defendant in an execution which is *prima facie* regular and valid, brings his action of replevin against an officer for property levied upon by virtue of said execution, he cannot show in support of said action that the judgment upon which the execution was founded has been paid. If, indeed, such be the fact, the debtor must resort to his remedy by petition for a *supervendeas*, and the issue of payment must be tried with the creditor, and not with the officer, who looks only to the process in his hands.
2. PROCESS. *Sheriff.* When an execution issued by a court having jurisdiction of the subject, is regular and valid upon its face, the simple duty of the officer into whose hands it is placed, is to execute the writ, as by it he

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is commanded ; he is neither bound or permitted to enquire after the judgment, for his office in this respect, is ministerial only.

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FROM CANNON.

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The defendant in error, as sheriff of the county of Cannon levied an execution regular and valid upon its face, upon a filly the property of the plaintiff in error who was the defendant in the execution. The plaintiff in error brought this action of replevin against the defendant to recover the property so levied upon ; and at the trial of said action in the circuit court of Cannon, offered to prove that the judgment upon which said execution was founded had been paid. This evidence was excluded by his Honor, (Judge MARCHBANKS, presiding,) and there was a verdict and judgment for the defendant, from which the plaintiff appealed in error.

C. B. DAVIS, for the plaintiff, cited act of 1835, ch. 17, § 7. *Eason vs. Cummings*, 10 Humph., 210.

G. W. THOMPSON, for defendant, cited 4 Yerg., 186. 10 Yerg., 254. 2 Swan, 292. 4 Humph., 48-50. Nich. Sup., 243.

TOTTEN, J., delivered the opinion of the court.

Replevin. The defendant, as sheriff of Cannon county, held executions in favor of one L. A. Kincannon, against the plaintiff, and levied the same on a filly, the property in question. The plaintiff, by the present suit, caused the property to be replevied, and at the trial, offered to

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prove in support of his action, that the judgment on which said executions were founded, had been paid and satisfied before the same were issued. The evidence was rejected.

There was judgment for the defendant, and plaintiff appealed in error to this court.

The evidence was properly rejected. When an execution, issued by a court having jurisdiction of the subject, is regular and valid upon its face, the simple duty of the officer is, that he execute the writ, as by it he is commanded. He is not bound to enquire after the judgment, or whether the same has been satisfied; nor is he permitted to do so, for his office in this respect, is merely ministerial. *Ethridge vs. Edwards*, 1 Swan's R., 426.

This is a settled doctrine, and by it the officer is protected in the execution of his office, and may also be enforced to perform it.

Now, in the present case, the executions, which appear to be regular and valid, afford a complete protection to the officer, and entitle him to the judgment of the court, that the property levied upon by him be restored to his possession, and be subject to said executions.

If, indeed, the judgments have been paid, the remedy of the debtor is by petition for a *supersedeas*, by which the execution will be legally suspended, until further action of the court.

The issue of payment must be with the creditor, and not with the officer, who looks only to the process in his hands.

Judgment affirmed.

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Lysander McGavock vs. A. J. Wood et al.

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## LYSANDER MCGAVOCK vs. A. J. WOOD et al..

1. **SLAVE.** *Action on a warranty of soundness. Measure of damages.* In an action upon a contract of warranty of soundness of a slave, the rule is, that the damages consist of the difference between the value of the property at the time and place of the sale, if sound, and its value in its unsound state. To this may be added the expenses of keeping, nursing and medical attention, if it be shown that the vendee offered to restore the property before these expenses were incurred. If he fail to do this, he can only recover in a suit upon the contract, according to the foregoing rule.
2. **SAME.** *Same. Same.* Where a slave is sold and purchased to be taken south or elsewhere for sale or service, and after said journey an action is brought by the vendee against the vendor, upon his warranty of soundness, there is no rule which authorizes the plaintiff to recover in said action, the expenses of said slave in making said trip.
3. **EVIDENCE.** *Meaning of witnesses.* The meaning of a witness on a jury trial, is a matter for the judgment of the jury, to be judged of by the language used; and it is error for the court to undertake to interpret it.

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FROM WILLIAMSON.

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This was an action brought by Wood and brother against McGavock in the circuit court of Williamson, on a warranty of soundness of a slave purchased by them of McGavock. The part of Judge BAXTER's charge excepted to is given in the opinion. The plaintiffs purchased the slave for the southern market for \$700, and sold her in Alabama for \$950. Soon afterwards the slave was returned to them as unsound, and they refunded the purchase money and brought the slave back to Williamson, where they had purchased her, and commenced this action against McGavock upon the warranty, claiming also compensation in damages for their necessary nursing and medical attention to said slave, and the

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expenses of her journey to and from Alabama. There was verdict and judgment for the plaintiffs for \$250, from which defendant appealed in error.

EWING & COOPER for the plaintiffs in error.

MARSHALL, FOSTER and COOK, for the defendants in error.

CARUTHERS, J., delivered the opinion of the court.

This is an action on the case, brought by the defendants in error, upon the warranty of soundness of a negro girl named Maria, made in an unsealed instrument on the 12th day of March, 1852, by the plaintiff in error.

The slave was bought for the southern market, to which she was taken and sold, but returned for unsoundness. A claim is also made for keeping, nursing, medical expenses, &c.

The law on the subject of damages is laid down in the charge to be, "that the measure of damages is the difference between what the plaintiffs gave for the slave and what she was worth in her unsound state, together with such reasonable doctor's bills as the plaintiffs had incurred in consequence of that unsoundness; to which might be added the necessary expense of taking her to the south and bringing her back again, provided the proof showed that the defendant knew that the plaintiffs purchased her with a view of taking her to the south to sell."

The general rule laid down by his Honor is not exactly correct. The difference between what is given for



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the property, and what it is worth in its unsound state, is not always the measure of damages. The amount paid is one circumstance, and a very strong one, to fix the value of the thing sold, under the supposition that it is sound, but the purchaser may have made a good bargain, and is entitled to the benefit of it. The rule is, that the damages consist of the difference between the *value* of the property at the time and place of sale, if sound, and its value in its unsound state, where the action is upon the contract of warranty. *Allen vs. Anderson*, 3 Humph., 583. To this may be added expenses of keeping, nursing and medical attention under proper circumstances.

But this is not referred to in the argument. The objection is confined to the latter part of the charge, which allows doctor's bills and the expenses of traveling to be included in the damages. We are not aware that this precise question has ever been decided in this State.

It came before the Supreme Court of South Carolina in the case of *Seibles vs. Blackwell*, 1 McMullen, 56-8; and it was decided that no expenses attending the property could be recovered, unless there had been an offer to restore the possession to the vendor before they were incurred. This is sustained by reference to the case of *Carwell vs. Coan*, 2 Camp., 82, where the doctrine is thus laid down by Lord Mansfield: "unless the defendant refuse to take back the horse, the plaintiff cannot complain that the expenses of the keep is necessarily thrown upon him. By not offering to return the horse before bringing the action, he intimates that he still considers the animal his own, and he therefore, ought to maintain him at his own expense."

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*Lysander McGavock vs. A. J. Wood et al.*

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The same doctrine is to be found in *Ohitty on Con.*, 266, sustained by reference to other authorities.

It is insisted that these rules may apply well enough to horses and other animals, but in cases of slaves there should be a distinction. It is difficult to see upon what ground it can be made. The doctrine seems to us to be reasonable in its application to slaves, as was done in the case referred to in South Carolina, as well as to any other property which it is expensive to keep.

The action is upon and in affirmance of the contract, not for any fraud in the sale which would rescind it. The vendor only binds himself for soundness, and that failing, he is liable to make it good in damages. He may choose to do so without further expense, if notified of the fact, and have the offer to take back the property. The purchaser has it in his power to give him this opportunity, or keep the slave himself, and resort to his action on the warranty to recover the difference in value. If he prefers to hold on to the slave and leave the contract open, he must be at all expenses himself; he has made his election. The vendor should not be forced to pay expenses until he has had the opportunity to take back the property to avoid them by supplying every thing necessary himself. If the slave were offered to the vendor he would have the election to receive him and regain the property in him by paying or becoming liable to pay the consideration; or refuse to take him back, and become liable for the difference in value between a sound and an unsound article, with all expenses of keep and attention. It would seem unreasonable to force the expenses upon him, when he had no power to avoid them by canceling the sale and regaining the property.

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It is the duty of the vendee to give notice to the vendor of the unsoundness, so soon as it is discovered, and offer back the property if he is dissatisfied with it. If he fail to do this he can only recover in a suit upon the contract, according to the rule before stated.

We know of no principle that would authorise the expenses of the slave to and from the south, to be recovered in an action on a general warranty of soundness.

On these two points we think his Honor erred. But there is very great difficulty in laying down any rule on this subject, which will not produce hardship and apparent injustice in some cases. We think, however, that those we have stated above are least exceptionable and most in conformity with the authorities. We are referred to no authorities in conflict with them.

Exception is also taken to that part of the charge in which the judge explained what the physicians meant by the seeds of disease being planted in the system. Perhaps this was a question belonging to the science of medicine, and would be more properly explained by medical men, in their examination as witnesses, rather than a judicial one to be expounded by the Court; but if the explanation given was the true one, no injury was done to either party. Yet, it would be better to leave the meaning of witnesses by the language they use, to the jury.

The judgment will be reversed, and the cause remanded for a new trial.

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JOHN A. MCEWEN, *adm'r*, vs. LEWIS TROOST *et al.*

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1. GIFT. *Of a chattel by parol. Delivery.* A parol gift of a chattel, or *chose in action*, whether it be a gift *inter vivos* or *causa mortis*, does not pass the title to the donee without delivery and transfer of the possession. The effect of a valid delivery is to place the subject of the gift under the control and dominion of the donee, and his title and right of possession by such gift and delivery become absolute and irrevocable. Such delivery must be according to the nature of the thing, as the actual delivery of a sum of money, the delivery of the key of a trunk, of a room, and the like.
2. SAME. *Of a chattel by deed. Same. Delivery of the deed.* The gift of a chattel by deed is valid at the common law though there be no actual delivery of the thing given. Its execution is a deliberate act, indicating the purpose of the donor as clearly as if there had been an actual delivery of the subject of the gift. Nor can inconvenience result from the practical operation of such a rule, as by our law the deed of gift is required to be registered, by which notice of the gift is given to creditors and purchasers. Delivery of the deed is essential to its execution, but it need not be formal and manual, if the intention to deliver and accept the deed manifestly appear.
3. DELIVERY OF THE DEED. *When presumed without proof of formal delivery.* Where the donor delivered the deed to the register for registry, and directed the same to be recorded, or subsequently assented thereto, it seems that such acts are equivalent to an actual delivery and acceptance. So, where the deed appears to be regularly executed and acknowledged by the donor, and registered; and the donor, a few days before his death, recognized its existence and declared his purpose that it take effect, and the donees assent to the deed and claim the subject of the gift under it, a delivery and acceptance may be inferred without any proof of a formal delivery.

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SAME CASE UPON A RE-HEARING.

1. CHANCERY. *Practice. Bill of interpleader.* The complainant, in a bill of interpleader, must present a case as to which the defendants are required to interplead; he should state his own rights and thereby negative any interest in the thing in controversy; and he should set forth the several claims of the opposing parties.

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FROM DAVIDSON.

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On the 22nd day of June, 1840, the late Dr. Gerard Troost made a deed of gift to his son and daughter,

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Lewis Troost and Caroline Stein, of all his mineralogical and geological collection; his collection of organic remains, with manuscript catalogues of the same; and his specimens of birds, reptiles, zoophytes and shells; his library, engravings, maps, and all the furniture containing the whole. Said deed of gift was acknowledged, and registered in the register's office of Davidson county, in October, 1840, the donor retaining possession of the cabinet until his death in 1850, when it fell into the possession of the complainant as his administrator. The consideration set forth in the deed of gift, was the donor's love and affection for the donees, and his desire that the collection should not be separated, whereby its value, in a scientific point of view would be impaired or destroyed. At the date of the deed of gift, the collection was estimated to be worth \$15,000 or \$20,000, and at the time of the donor's death it had greatly increased in value. After his death the donees claimed the collection in virtue of their deed, and the widow asserted her claim to a share in the same, as one of the distributees. In view of this conflict, the plaintiff in error, as administrator, filed this bill in Chancery at Nashville, in the nature of a bill of interpleader. The bill sets forth the execution of the deed, and a certified copy thereof, from the register's office, is exhibited in proof, and the complainant asks a construction of the same on the legality of the gift, where the donor remains in possession of the subject thereof. The donees answer, and claim the collection under the gift; alleging that it remained in possession of the donor with their assent, as a depository for them, and that it was, in legal effect, delivered to them.

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The answer of the widow denies the execution and delivery of the deed, demands the production of the original, and asks that the collection be distributed as assets of the estate. There was a decree by the Chancellor, (Judge BRIEN,) declaring the gift void, and that the collection go to the complainant as assets, to be distributed; from which decree the defendants appealed. After judgment in this court the case was reconsidered on the petition of the respondent, Mrs. Troost.

JOHN A. McEWEN, for the complainant.

MEIGS, FOGG and TREMBLE, for the respondents.

TOTTEN, J., delivered the opinion of the court.

It appears from the bill that Dr. Gerard Troost died intestate at Nashville, Aug. 15th, 1850, and that plaintiff was appointed administrator of his estate. It consists of funds, negro slaves and other effects. The bill then states that intestate died possessed of a very valuable collection of natural and scientific specimens, with manuscript catalogues of the same; also of a large, varied, and valuable library of scientific and literary books; an extensive assortment of engravings and maps, together with suitable and costly presses and furniture, wherein the same were kept. That the said intestate spent most of his life in collecting this cabinet, and that it is estimated to be of the value of fifteen or twenty thousand dollars.

That on the 22nd of June, 1840, the intestate executed to his two children, Lewis Troost and Caroline

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Stein, a deed of gift for said cabinet and library; that the deed was duly acknowledged and registered, a certified copy whereof is exhibited with the bill; that said cabinet and library were not delivered into the actual possession of the donees, but remained in the possession and use of said intestate to the time of his death, and are now in the possession of his administrator; that said intestate was, by profession, a geologist and mineralogist, and continued to make additions to said cabinet and library after the execution of said deed. The two donees and Mary Troost, the widow of intestate, are defendants to the bill; and it seeks to obtain the opinion of the court as to the effect of said gift upon the title of said cabinet and library, and whether the same are assets to be administered or not.

The answers of defendants admit, substantially, the facts stated in the bill, except that the donees say that the cabinet, library and articles named in said deed of gift, were, in legal effect, delivered to them; and that they permitted the same to remain with Gerard Troost as a depository for them; and except that Mary Troost denies any knowledge of the execution of the deed of gift, and insists that the original be produced. It appears from the deposition of Return J. Meigs that the cabinet and library were kept by Doctor Troost in a building called the Laboratory, on college hill, and continued there until his death, without any change of the possession after the execution of said deed. A few days before his death, Dr. Troost conversed with Mr. Meigs about this gift, and said, "If the cabinet and library were to be disposed of now he would make the same disposition of them as he had already made;

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that he had made the deed partly to keep the cabinet from being separated." Mr. Meigs knew of the existence of this deed of gift before the conversation with Dr. Troost, and desired him to settle the balance of his property on Mrs. Troost, which he said he would do, and would furnish to Mr. Meigs a memorandum for that purpose, but died before it was accomplished. The deed exhibited with the bill purports to be acknowledged by the donor before the clerk of the county court of Davidson, and duly registered.

Counsel for the plaintiff insist that the deed was void, because the cabinet and library were not, at the time, delivered to the donees.

It is true, that delivery is essential to the validity of a parol gift of a chattel or *chose in action*, whether it be a gift *inter vivos* or *causa mortis*; and without delivery and a transfer of the possession, the title does not pass to the donee. The delivery must be according to the nature of the thing, as the actual delivery of a sum of money, the delivery of the key of a trunk, of a room, and the like. The effect of a valid delivery is to place the subject of the gift under the control and dominion of the donee, and his title and right to possession become absolute and irrevocable. *Noble vs. Smith*, 2 Johns. R., 55. *Ewing vs. Ewing*, 2 Leigh R., 340. *Bunn vs. Markbham*, 2 Taunt, 224. 2 Bl. Com., 441. 2 Kent Com., 438. But a gift by *deed* is valid at the common law though there be no actual delivery of the thing given. *Irons vs. Smallprew*, 2 B. & Ald., 552. *Cains vs. Marley*, 2 Yerg. R., 582.

The execution and delivery of the deed are considered to be equivalent to the delivery of the subject of



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the gift. By our law the deed of gift is required to be registered, by which notice of the gift is given to creditors and purchasers; 1831, ch. 90, § 1. No inconvenience, therefore, can result in the practical operation of the rule. As between the parties, there can be no reason why the deed should not be conclusive as to the intention of the donor, and the fact that the gift was made. Its execution is a deliberate act, indicating the purpose of the donor as clearly as if there had been an actual delivery of the subject of the gift. Now, in the present case there was no actual delivery of the cabinet and library; they remained in the possession and use of the donor until the time of his death; but the donees say it was with their consent. If the gift were *in parol* it would be clearly invalid. But the gift is by deed, and may therefore, be valid without actual delivery of the subject of the gift.

We have seen, however, that Mary Troost, one of the defendants, does not admit the execution of the deed; which objection implies that it was not signed, sealed and delivered by the donor.

It is true that delivery is essential to the execution of a deed, but it need not be formal and manual, if the intention to accept the deed manifestly appear. 4 Kent Com., 456. *Martin vs. Ramsey*, 5 Humph. R., 350. The delivery may be inferred from other facts; and therefore, the possession by the obligee of a deed regularly executed, is *prima facie* evidence of its delivery. 4 Peck, 520. 14 Peters, 327. If a deed be made and delivered to the register for registry, without more, that is no delivery; but if the grantor directed it to be recorded, or subsequently assented to

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it, we should consider that equivalent to an actual delivery and acceptance. *Maynard vs. Maynard*, 10 Mass., 456. *Sampson vs. Thornton*, 3 Metcalf, 275. 4 Kent Com., 455, note.

Now, the deed in question appears to be regularly executed. It was acknowledged by the donor, and registered. A few days before his death he recognized its existence and declared his purpose that it take full effect. The donees assent, as it seems, to the deed, and claim the subject of the gift under it. From these facts we may infer the delivery and acceptance, in absence of any proof of a formal delivery.

As to the objection that the original was not produced, we do not think that the rule as to secondary evidence applies to the case. The plaintiff represents the title of his intestate, and the contest is properly between him and the donees who claim under the deed. He admits its execution, exhibits a copy and insists that it is not valid, because the subject of the gift was not actually delivered. In this view the production of the original was not necessary. We have considered the case, therefore, without reference to this last objection, which, from any thing that now appears, is merely formal. But, if in point of fact, it be founded in merit, the party making it will not be precluded by the present judgment.

We consider that the gift was valid, and that it had the effect to vest in the donees the title to the property named in the deed.

The decree of the Chancellor will be reversed.

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## SAME CASE UPON A REHEARING.

TOTTEN, J., delivered the opinion of the court.

We have reconsidered this case; and upon the facts as they now appear, are satisfied with the opinion that has been delivered.

A gift by *parol* is not valid unless the subject of the gift be delivered to the donee. But a gift by *deed* is valid at the common law, though there be no actual delivery of the thing given. We have stated also, the general doctrine as to what shall be held a constructive delivery of a deed, and to that we adhere. But it is to be observed that the bill raises no question of contest as to the execution and delivery of the deed; on the contrary it admits it and exhibits a copy from the registry. And the question in contest, raised by the bill and by counsel in debate, was mainly whether the gift was valid without delivery of possession?

The answer of Mary Troost denies any knowledge of the execution of the deed of gift, and requires that the original be produced. This is the matter now relied upon in the petition for rehearing; as if the case in judgment before us need not be stated in the bill, but only in the answer of one of the defendants.

Now, if the case be an interpleader, "the plaintiff should state his own rights and thereby negative any interest in the thing in controversy; and he should also state the several claims of the opposing parties." Story Eq. Pl., § 292, and cases. The bill must present a

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case as to which the defendants are required to interplead. We have seen that the bill raises no question as to the execution and delivery of the deed; and as the plaintiff is interested in the thing in controversy, his admission of the execution of the deed, in the case as it is now presented, supersedes the necessity of proof on that subject, by the defendants, who claim against him under the deed.

Considering that the execution and delivery of the deed were not fully and distinctly in issue, and that its validity is denied by Mary Troost, we have thought it proper that the decree be so made that she be not concluded by the present judgment.

As the case now appears, we consider that the gift is valid; but without giving any final judgment, the case will be remanded, with leave to amend the pleadings, and with leave to Mary Troost to institute a proceeding in the nature of a cross-bill, if she think proper; so that the validity of the deed may be fairly tested upon the facts as they may appear.

Decree reversed and cause remanded.

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Bridgewater, *ex'r of F. Pride, vs. The Legatees of Pride et al.*

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BRIDGEWATER, *ex'r of F. Pride, vs. THE LEGATEES OF*  
*F. PRIDE et al.*

1. EMANCIPATION. *Acts of 1831, ch. 102—1842, ch. 191, and 1849, ch. 102.* The act of 1849, ch. 102, repeals the act of 1842, ch. 191, regulating the emancipation of slaves in this State, and restores in all its rigor, the act of 1831, ch. 102. So, where a testator dying in 1850 made a bequest of freedom to certain slaves provided they could remain in this State as free persons of color, and if they could not remain in this State, directed the sale of said slaves and the division of the proceeds of said sale among certain legatees named in the will; such a conditional bequest does not show a general predominating intention to emancipate where the mode and means are secondary, but the intent is dependent upon the condition, which being unlawful, said slaves are not entitled to their freedom, but must be sold and remain in bondage by the express provisions of the will. (*For the present condition of the law upon this subject, see act of 1854, ch. 50, and post, Lancaster vs. Boon.*)
2. SAME. *Will. Construction.* Where a testator bequeaths freedom to a number of his slaves to take effect upon certain conditions, and in the event said conditions cannot be performed, directs the sale of a certain number of said slaves for division among the legatees, excepting out of said sale certain of the number whom he directs his executor to take charge of and treat kindly, but to set free as early as practicable, it is the duty of said executor to take charge of the slaves so excepted in obedience to the will, and to emancipate them as soon as it is practicable in compliance with the law.

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FROM SMITH.

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Francis Pride died in May, 1850, in the county of Smith, leaving a last will and testament, in which Bridgewater, the complainant, was named as executor, and who was duly qualified as such. The testator, by said will, made a bequest of freedom to a large number of his slaves, upon condition that they be permitted under the laws of this State to remain in this State as free persons of color, or if this was impracticable, that they could be carried to the State of Illinois and be suffered under the laws of that State to remain there

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as free persons of color, and if neither of said conditions were practicable he directed that certain of said slaves should be sold, and the proceeds of such sale be divided amongst certain legatees, (naming them,) and as to the balance of the slaves, (naming them,) he directed that his executor or some other person for him, take charge of them and treat them kindly, but to give them their freedom as early as practicable. The complainant, as executor, filed this bill in chancery at Carthage, seeking a construction of the will, with reference to the bequest of freedom to said slaves, and asking the Chancellor's directions as to the proper execution of his trust. The legatees and the slaves by their next friend, answered the bill; the former contesting and the latter insisting upon their right to freedom. It seems that by an act of the Legislature of the State of Illinois, approved 12th of February, 1853, which was properly certified and copied into the record, free persons of color are prohibited under heavy penalties, from emigrating to and settling in that State. Chancellor RIDLEY decreed that the slaves were entitled to their freedom, from which decree the legatees appealed to this court.

J. B. MOORES, for the complainant.

JORDAN STOKES and CAMPBELL, FITE and McLAIN, for the respondents.

CARUTHIERS, J., delivered the opinion of the court.

The bill in this case, was filed by the complainant as executor of Francis Pride, against the defendants,

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as legatees in his will, for instructions in the execution of his trust. The slaves named in the will answer by their next friend, and claim their freedom, which presents the only important question in the case. The Chancellor decreed that they were entitled to emancipation under the will, from which an appeal was taken to this court.

The case must turn entirely upon the question whether the act of 1842, ch. 191, is so far repealed by the act of 1849, ch. 109, as to disallow slaves thereafter emancipated, to remain in this State, and restores in all its rigor, the act of 1831, ch. 102. To this question the argument is mainly confined, and we think correctly. The same point was brought before us at the last term at Knoxville, as one of the questions in a case there decided, and our opinion was in favor of the implied repeal. But, as we regard it an important question, we have attentively heard it reargued in this case and reviewed the grounds of that decision. But the conclusion to which we arrive is still the same.

The last act can have no other object but to supercede the provisions made in the act of 1842, for emancipated slaves to continue in the State, and to fall back upon the policy of the act of 1831. It is entirely a question of policy, of which the Legislature, at distinct periods, have taken different views. It is a vexed and perplexing question, upon which public opinion, acting upon the representatives of the people, has been subject to much vibration between sympathy and humanity for the slave, and the safety and well being of society. Hence, the frequent changes in our legislation on the subject.

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In 1831 it was thought that the best interest of the community required that the number of free negroes should not be increased either by new acts of manumission or emigration, and the act of 1831, ch. 102, was passed. By the second section, as a condition precedent to the consent of the State, a bond with security was required to be given in a sum equal to the value of the slave, by the person proposing to manumit, that the negro to be freed shall leave the State forthwith. The first section made it a felony, punishable by fine and also confinement in the penitentiary, for any free negro to come into this State and remain twenty days. By the act of 1833, ch. 81, slaves who had contracted for their freedom before the passage of the act of 1831, or in cases where the owner had died before that time, and bequeathed to them their freedom, were exempted from the provisions of said act, and were allowed to be set free according to the pre-existing laws. The act of 1842, ch. 191, § 1, enacts "that when any slave has been or shall be emancipated in this State, agreeably to the laws now in force, and where any free persons of color shall have removed to this State previous to the 1st of January, 1836, it shall be lawful for such free person of color to prefer his petition to the county court of the county in which he or she is residing, or may wish to reside, setting forth the causes, &c.; and such court, upon being satisfied of good character, &c., may grant permission to remain &c. Bonds to keep the peace, and be of good behaviour, to be renewed every three years, to be given. This is in substance, a repeal of the act of 1831, as to negroes of good character in the opinion of any



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county court, or such as were in the State before 1836, or natives of the State. To be sure the bond to leave the State was still to be given, but at the same time it could be annulled by an order of the court made upon petition, &c., to remain in the State.

This policy continued until the 30th December, 1849, when the Legislature enacted, ch. 107, "that the act of 1842, ch. 191, be so amended that hereafter no slave shall be emancipated in this State except upon the terms and conditions imposed by the act of 1831, ch. 102."

This act it is believed, has been regarded by the courts and profession, ever since its passage, as a repeal of that part of the act of 1842, which provides for slaves thereafter to be set free, to remain in the State, and we believe that such was the intention of the law makers. It is difficult to see what other effect can be given to it. The phraseology is not the best that might have been selected, but the meaning is sufficiently explicit.

The will under consideration provides that all his slaves be hired out until a fund is produced sufficient to pay all debts and expenses to be incurred in setting them free and removing them to Illinois, if they should be taken there, with one year's support.

"*Article 3.* I will, or give, all the above named slaves their freedom, if they can be emancipated according to the laws of Tennessee and remain in Tennessee as free persons of color, or when emancipated here if they can be removed to the State of Illinois and live there and be protected as free persons of color by the constitution and laws of that State. *Article 4.* I direct if my said slaves cannot be emancipated and remain in

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Tennessee, or be removed to Illinois, and remain there as free persons, that they be sold, except," &c.

These last, being eleven in number, are to be kept and taken care of by the executor, or such person for him as will treat them kindly, &c., but to have their freedom at as early a time as practicable.

By the sixth article, the proceeds of those which are to be sold on the condition aforesaid, being twenty-eight or thirty in number, are to be distributed between certain nephews and nieces.

Here there is a bequest of freedom upon the express conditions that after manumission the negroes can legally remain in Tennessee or Illinois. We have seen that they cannot be allowed to remain in this State. By an act of the Legislature of Illinois, approved February 12th, 1843, they are prohibited under heavy penalties, from emigrating to or settling in that State. Which act is legally certified and copied into this record.

The condition then, upon which freedom was given having failed, the said slaves must be sold and remain in bondage, and this by the express provisions of the will.

This is not a case where there is a general predominating intent to emancipate, and the mode and means are secondary; but the intent is made to depend entirely upon the annexed condition that they can lawfully remain in Tennessee or be removed to Illinois, and allowed to live there under the protection of their laws.

They must therefore be sold, and the proceeds paid out as directed by the will. Those reserved from sale will be kept by the executor, as directed, until they can be set free by a compliance with the law, and this it is

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the duty of the executor to do as soon as practicable, and the case shall remain in the court below for further orders and directions on this subject. We do not now determine what will be their condition if their manumission should not be effected in a reasonable time, but only that it is the duty of the executor to effect it if practicable under our laws.

A decree will be drawn up in pursuance of this opinion, and the cause remanded for the execution of the same. All the costs here and below will be paid by the executor out of the funds in his hands.

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W. E. WATKINS vs. B. M. BARNES.

1. *MOTION. Sheriff. Notice waived by appearance.* In the remedy by motion, the notice is not the commencement of the suit, nor is it a judicial process; but the individual act of the party required by the statute for the benefit of the party to be moved against, that he may have an opportunity to contest the motion. But if he should appear without it, the only purpose of the notice is answered, and he cannot defeat the proceeding on the ground that he had no notice.
2. *SAME. For non-return of Execution.* A motion made against an officer for failing to return an execution, cannot be sustained by showing an insufficient or false return.
3. *SAME. Statutes authorizing, to be strictly pursued.* The remedy by motion is a proceeding unknown at common law, which deprives the party of a jury trial, and is therefore liable to great abuse and must be strictly pursued. The motion is the commencement of the suit, and the record must show distinctly the particular ground upon which it is made, and upon that the

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W. E. Watkins vs. B. M. Barnes.

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judgment to be valid must be rested. If that is not sustained the motion fails.

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FROM DAVIDSON.

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This was a motion made by Watkins against Barnes as Sheriff of Davidson, in the circuit court of said county, for *failing to return* an execution. The execution was for the sum of \$1033 75, and was issued from the May Term, 1851, of said court, and returnable to the following September Term. It seems that the execution came to the hands of the sheriff on the same day issued, and on the 18th day of August, 1851, he made the following return, "came to hand the same day issued and levied this *f. fa.* on one negro man named Wade, about 30 years old, and Keziah, aged about 24 years, agreed to be worth seven hundred and fifty dollars, and bond taken as herein filed 18th August, 1851. B. M. Barnes, sheriff." "Which bond is this day forfeited, and is hereby made a part of this return, this the 8th September, 1851. B. M. Barnes, sheriff." The value of the negroes levied upon is stated in the delivery bond at \$1,150. There was no notice given to the sheriff of the time and place of the motion—but he appeared and defended by counsel. At the May Term, 1853, of said court, Judge DAVIDSON, presiding by interchange, the motion was dismissed and the plaintiff appealed to this court.

A. EWING and DEMOSS, for the plaintiff.

R. G. SMILEY, MANEY and N. S. Brown, for the defendant.

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CARUTHERS, J., delivered the opinion of the court.

This is a motion for judgment against the defendant, as sheriff of Davidson county, and his sureties, made 22d January, 1852, "for failure to return an execution in favor of said Watkins, and against Edwin W. Hickman."

At May Term, 1853, of the circuit court of Davidson county, the motion was considered and dismissed, and appeal taken.

It is insisted for Barnes: 1. That he had no notice of the intended motion as required by law; the motion having been made at a term, subsequent to that to which the *fi. fa.* was returnable. This is not an open question. It has been several times decided by this court, that appearance and defence cures the defect. The notice is not the commencement of the suit, nor judicial process, but the individual act of the party, required by the statute for the benefit of the party to be moved against, that he may have an opportunity to contest the motion. But, if he should appear without it, the object of the notice is answered, and he cannot defeat the proceeding on that ground. 6 Humph., 98, *Broughton vs. Allen*.

2. That the motion is for a *failure to return* the execution, and the ground relied upon, the question presented by the facts shewn in the bill of exceptions, is, whether the return though made in due and proper time is, "an insufficient return," and not a full and perfect response to the writ.

Without examining or deciding whether the return is "insufficient" or not, we have no hesitation in holding that a motion made for a *failure to return*,

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cannot be sustained by showing an *insufficient or false return*.

The act of 1835, ch. 19, § 6, Car. & Nich., 300, authorizing this summary proceeding against sheriffs, makes four distinct grounds for it. 1. Failure to make due and proper return of an execution received by him.

This means, that the process must not only be handed into the office of the clerk who issued it at the time prescribed by law, but he must endorse his action upon it for the inspection of the court, and the information of the parties.

2. "An insufficient return."

3. "A false return."

4. "Where it is returned, that the whole or a part of the money is collected, and fails to pay it over."

These are the only cases in which a collecting officer is made liable, in this summary way, by which he is deprived of a jury trial. In all other cases of neglect, or unfaithful discharge of duty, he can only be proceeded against in the common law action and rendered liable to damages by the verdict of a jury upon general principles. The great stringency and rigor of this statutory proceeding, though perhaps, necessary and proper to enforce a faithful discharge of duty by these officers in the particulars designated, would seem to dictate the propriety of requiring reasonable strictness in the proceedings, and a close adherence to the provisions of the statute. It is a new and speedy remedy, unknown to the common law, in which the party is deprived of the benefit of a jury trial, so much favored in our system. It is liable to great abuse and hardship, and often most unjust in its operation and consequences.

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The motion is the commencement of the suit, and the record must show distinctly the particular ground upon which it is made, and upon that the judgment to be valid must be rested. If that is not sustained, the motion fails. In this case the motion is made for failure to return the execution, and the case proposed to be made out, is, that the return is insufficient.

This cannot be done, and the judgment of the circuit court is affirmed.

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CHARLES D. CRAWFORD vs. JOHN WILLIAMS.

1. CONTRACT. *Carrier. Freight pro rata itineris.* Where a carrier's right to freight is founded in contract, it must appear that he has performed its conditions, or that he has been excused performance by the owner of the cargo, to entitle him to demand it. X So, where the master of a vessel contracted to deliver his cargo at its port of destination for a stipulated price, and after performing the greater part of his voyage was prevented by inevitable casualty from prosecuting it further, but transhipped the cargo to another vessel without the knowledge of the owner of the cargo, and upon a contract for such transhipment of three times the amount of his original contract, which the owner had to pay on delivery of the cargo at its port of destination, X said master is not entitled to his freight *pro rata* for so much of the voyage as he actually performed under his contract, between the port of original shipment and the port of necessity.

2. AGENT. *When vessel disabled in transitu. Agency of master. Same.* When a vessel is so disabled during its voyage that it cannot proceed on the same, and the cargo is in peril of loss, the law implies an agency from necessity, on the part of the master, to act for the interest of all concerned; and it is his duty in such case to tranship the cargo, and he has a right to charge it with such freight as it was proper to give; but it does not follow that he will be entitled to freight *pro rata* for the performance of part of the voyage.

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3. FREIGHT. *When pro rata freight is due.* Freight is due *pro rata itineris* when the vessel by inevitable necessity is forced into a port short of her destination, and is unable to prosecute her voyage further, and the cargo is there voluntarily accepted by the owner. The consent of the owner to accept the cargo at such intermediate port, must either by word or act, be expressly given or fairly deducible, and when so given, the *original contract is dissolved*, and the claim to such *pro rata* freight rests upon the basis of a *new contract*, which the law implies.

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FROM MAURY.

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The plaintiff in error brought his action of assumpsit in the circuit court of Maury, against the defendant, for freight which he claimed as the owner of a flat-boat, upon which he had conveyed the defendant's cargo of cotton from Maury county to Grand Gulf on the Mississippi river. It appears that Crawford had contracted to deliver the cotton, numbering some three hundred and forty-six bales, to Williams, in the city of New Orleans, at the rate of \$2 per bale, and that he performed the voyage as far as Grand Gulf, where, by some unavoidable casualty the boat was wrecked and disabled from prosecuting the voyage further. In this condition of things the cotton was transhiped on the steamer Marengo, without the consent of the owner of said cotton, and consigned to said Williams at New Orleans at the rate of \$6 per bale, which Williams had to pay before he could get possession of said cotton. It seems, also, that the master of the Marengo paid the captain of the flatboat, the plaintiff's agent, about \$180, but upon what account does not clearly appear.

This action was brought by Crawford to recover his *pro rata* freight for so much of the voyage as he actually performed. There was verdict and judgment below



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for Williams, (MARTIN, Judge, presiding,) from which Crawford appealed in error.

M. S. FRIERSON, for plaintiff.

1. We admit that the majority of the American courts, in direct opposition to the English courts, and the opinion of continental jurists, hold that where there is a contract of affreightment to deliver goods at some particular port, and the vessel from accident or any other necessity, becomes unable to complete the voyage and abandons the cargo at some intermediate point, the vessel cannot demand freight *pro rata*, unless the cargo is there accepted. 2 Am. L. C., 676-679.

2. But if the shipper either expressly or impliedly accepts the cargo at such intermediate port with the assent of the master of the vessel, he is bound to pay freight *pro rata*. 2 Am. L. C., 678.

3. If the master of the vessel does not assent to deliver the cargo at such intermediate point to the shipper, but offers or does tranship the cargo to the port of destination, he is entitled to full freight. 2 Am. L. C., 678.

4. But neither of these principles apply to the present case, and we shall therefore not attempt to controvert their correctness. Here the cotton was transhipped by the master and delivered at the port of destination, but at an increased expense over that anticipated at the time of contract of affreightment; and the question now is, upon whom shall it fall, or how shall it be apportioned?

1. We admit that if this additional expense was superinduced by the fault or neglect of the plaintiff or his

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agents, he would not only have to bear the loss of his freight, but would be bound to pay damages for the negligence of himself or his agent.

\* 2. But if the vessel, from a necessity superinduced by the act of God, the public enemy, or the dangers of the river, were wrecked, and to save the cargo from such peril these expenses were incurred, then the master of the vessel would not be bound to pay them, and the loss would fall upon the owner or insurer; for in all such cases the master is clothed with power independent of the contract of affreightment, to bind the goods and cargo for any sum necessary to extricate them from peril or for furtherance of the object of the voyage; he may hire another vessel to carry it to the port of destination, and if at an increased expense the owner or insurers will have it to pay, because it was incurred in saving the cargo from a peril excepted out of the plaintiff's contract, the risk of which they took upon themselves; and whatever was expended in saving them from this loss they would be bound to pay. 2 Am. L. C., 678. 3 Kent, 212. 4 Johns. Ch. R., 214. 5 Johns. R., 262. 36 Com. L. R., 150, 158.

3. The steamboat, "Marengo," was allowed six dollars per bale "for saving and bringing the cotton to the port of destination," and the plaintiff is entitled to freight according to the original contract, to the port of necessity, and the owners or insurers paying the expenses of saving the cargo at the port of necessity, and freight from there to the port of destination. This would only give the plaintiff the freight he actually earned, and compels the owners or insurers only to pay for saving the goods from a risk which they alone had assumed;

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which apportionment is classed under the head of general average, as has often been decided by our courts. 2 Am. L. C., 651. 3 Kent, 232, 244, 248. 3 Barn. & Ald., 523. 2 Am. L. C., 572, 589. 3 Kent, 231, note. 13 Peters, 331, 344.

4. The defendant in this case, in settling with the consignees, retained in his own hands the amount of freight contracted to be paid the plaintiff; and surely as they paid it to the defendant, he cannot, upon any principle of equity or justice, detain it from the plaintiff.

S. D. FRIERSON and MYERS, for defendant.

1. In all cases of loss the onus is on the carrier to show diligence. Story on Bailments, 523, and cases there cited.

2. If loss occur by perils of the sea, which might have been avoided by exercise of reasonable skill or diligence, it is not such loss by perils of the sea as will exempt the carrier from liability. Story on Bailments, 523.

3. If the carrier cannot show that the loss of the goods occurred by one of the excepted perils, he must pay the loss; and proof of negligence is unnecessary to charge him. U. S. Dig., Sup. 3 vol., p. 790. *McCall* vs. *Brock*, 5 Strob, 119.

4. Freight, in the common acceptation of the term, means the price for the actual transportation of goods by sea from one place to another. The delivery of the goods at the place of destination, according to the terms of the charter, is necessary to entitle the owner of the vessel to freight. The condition of the delivery of the

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cargo is a condition precedent, and must be fulfilled. A partial performance is not sufficient. 3 Kent's Com., p. 219, 227. *Brown vs. Ralston*, 4 Randolph, 504.

5. Freight *pro rata itineris* is not ordinarily due unless there has been a voluntary acceptance of the cargo by the owner at an intermediate port, and not when accepted of necessity. *Caze vs. Baltimore Insurance Company*, 7 Cranch, 358. U. S. Dig., Sup. 2 vol., p. 75.

6. If the vessel be disabled the master may repair his vessel, or hire another vessel and complete the voyage, and thereby earn his freight; and he may charge the cargo with the increased freight arising from the hire of the new vessel. 3 Kent's Com. 212.

7. But extra freight means the surplus beyond which the freight would have been by the original charter party, if no necessity of hiring another vessel had existed; and the owner of the goods is not liable to double freight; that is, the old and new freight united. 4 Johns. Ch. R., 226, 227, *Scarle vs. Scovell*. Vide 1 Swan, 347.

TOTTEN, J., delivered the opinion of the court.

Assumpsit. The claim is for freight on three hundred and forty-six bales of cotton, shipped on plaintiff's boat, "old Maury," in Maury county, Tennessee, and to be delivered to the defendant, the consignee, at New Orleans, at the rate of two dollars per bale. The "old Maury" was wrecked by a mere accident on the way, about one hundred miles above New Orleans, and the cotton reshipped by the master, the plaintiff's agent, on the steamer "Marengo," and taken into port at New

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Orleans, where she claimed a freight on the cotton at the rate of six dollars per bale. Her bill of lading given to the "old Maury," entitled her to demand this freight, as appears by the evidence of W. J. Frierson, and defendant was compelled under an award to pay it before he could get possession of the cotton. The master of the "old Maury" received from the "Marengo" \$180.00, which, as we understand it, was on account of freight. This, however, is not a material circumstance in the case. The "old Maury" was partially filled with water, and in a sinking condition when its cargo was transhipped in the "Marengo."

His Honor, the circuit judge, instructed the jury in effect, that the plaintiff's right to freight was upon condition that he deliver the cotton to the consignee at the port of destination; that if his own boat became disabled from any cause, he might tranship the cargo upon another boat, and thus comply with the contract and be entitled to the freight; that if his own boat became disabled from casualty of the river it was his duty to use every reasonable exertion to save the cargo and forward it to another boat; but if the freight charged upon the transshipment exceeded that which the plaintiff was to have by his contract, the plaintiff would not be entitled to any freight. The charge is very full, but this is all that is material to the facts of the case. The judgment was for defendant, and the plaintiff appealed in error.

The counsel for plaintiff insists that he is entitled to freight *pro rata* to the port of necessity, where the cotton was transhipped on the "Marengo;" that the voyage was arrested by an accident of the river, and

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without any fault of the plaintiff or his agents; that in such case, it was proper, in order to save the cargo, to tranship it on another vessel, to which it became liable for freight and reasonable charges, from the place where the voyage was arrested to the port of destination, and that the plaintiff was entitled to freight *pro rata* for that portion of the voyage which he had performed.

We cannot agree to the position assumed by the counsel. The plaintiff's right to freight is founded in contract, and to entitle him to demand it, it must appear that he has performed its conditions, or that he has been excused performance by the owner of the cargo.

\* In cases of necessity, says Mr. Kent, as where the ship is wrecked, or otherwise disabled in the course of the voyage, and cannot be repaired, or cannot, under the circumstances, without too great delay and expense, the master may procure another competent vessel to carry on the cargo, and save his freight. If other means to forward the cargo can be procured the master must procure them or lose his freight; and if he offers to do it and the freighter will not consent he will then be entitled to his full freight. 3 Kent's Com. *Griswold vs. New York Insurance Co.*, 3 Johns. R., 321.

He is permitted in such case, to forward the cargo by another vessel, and this will be deemed a compliance with his contract and entitle him to freight. But if it be not forwarded to the place of destination, the condition upon which the right to freight depends has not been performed, and no such right can exist unless the owner of the cargo consented to receive it at the

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intermediate port, where the voyage from necessity was arrested. *Hunter vs. Prinsip*, 10 East, 378.

But the freight charged by the "Marengo" was a greater sum than that stipulated for the entire voyage; and if it be considered that the "Marengo" was employed by the plaintiff so as to enable him to comply with his contract to deliver the cargo to New Orleans, there remains nothing due to the plaintiff under his contract.

There is no question but that it is the duty of the master of the "old Maury," acting as the agent of the owner of the cargo, to tranship it, and he had the right to charge it with such freight as it was proper to give. His own vessel being disabled so that he could not proceed on the voyage, and the cargo being in peril of total loss, the law implies an agency from necessity, that the master may act for the interest of all concerned. 3 Kent's Com., 212. *Scarle vs. Scovell*, 4 Johns. Ch. R., 218. But it does not follow that he will be entitled to freight *pro rata* for the performance of part of the voyage.

That was not the agreement, and he must bear his portion of a loss occasioned by an accident that might occur, and in this case was inevitable. The defendant was compelled to pay three times the stipulated freight, and the cargo was in some degree, injured by the accident. Is he, in addition to this, liable to pay a *pro rata* freight to the plaintiff? If so, the entire loss is made to fall upon the owner of the cargo or upon his insurer, to whom he has paid a premium for indemnity.

In *Callender vs. Insurance Co. of North America*, 5 Binney 525, reported also in 2 A. L. Cases, 588.

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Tilghman, C. J., in view of the authorities, states the rule to be, that *pro rata* freight is not due unless the consent of the merchant, either by word or action, has been expressly given, or may be fairly deduced, to accept his goods at an intermediate port; and such consent being given, the original contract is dissolved and a new one arises. And so Mr. Kent, 3 Com., 229, "freight *pro rata itineris* is due where the ship, by inevitable necessity, is forced into a port short of her destination, and is unable to prosecute the voyage and the goods are there voluntarily accepted by the owner. It rests upon the basis of a new contract which the law implies.

Now, in the present case, there is no pretence that the cargo was accepted by the owner at the intermediate port, where, from necessity the voyage was arrested, nor was it received until it was taken by the "Marengo" to New Orleans, the port of destination.

We are of opinion that the plaintiff is not entitled to recover, and order that the judgment be affirmed.

Judgment affirmed.



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 Willis S. Brakefield vs. The State.
 

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## WILLIS S. BRAKEFIELD vs. THE STATE.

1. EVIDENCE. *Dying Declarations.* Declarations made merely in fear or apprehension of death, are not admissible as evidence. To render them admissible as dying declarations, they must be made in view of impending and inevitable death, and when the party is conscious of the fact. When thus made, in a condition so impressive, when there is no hope of time and no motive to falsehood, they carry with them as high a guaranty for truth, as if made under oath.
2. NEW TRIAL. *Juror.* A prisoner has a right to a fair and impartial jury, none of whom have prejudged his case; and although loose impressions or conversations of a juror, if disclosed by him, or others, to the court, will not have the effect to set him aside as incompetent, yet if it be shown after conviction that any one of the jurors had, before the trial, expressed an opinion seemingly well grounded, as to the guilt of the prisoner, he is entitled to a new trial. So where a juror, when presented and tried *quoad affectum*, may be apparently competent—and after conviction it was shown that said juror, before he was taken on said jury, had been heard to say in reference to the prisoner, "damn him, he ought to be hung;" *Held*, that such statement being made in the strongest terms of opinion, conviction and prejudice, said juror stood convicted of having prejudged the case, and that the prisoner is entitled to a new trial.
3. SAME. *Counter affidavits.* It is well settled that the affidavit of an offending juror, cannot be heard to exculpate himself and prejudice the prisoner; nor is it competent to receive the affidavits of other jurors to the effect that the offending juror was favorable to the prisoner on the trial. The issue is, was the juror competent—not what his conduct was after he was taken upon the jury. If he was put to the prisoner as a competent juror, when in fact he was incompetent, the rights of the prisoner were violated, and it is a legal presumption that he was injured.

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 FROM FRANKLIN.
 

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The prisoner was indicted in the circuit court of Franklin county for murder. At the November Term, 1853, of said court, (Hon. A. J. MARCHBANKS, presiding,) he was convicted of murder in the second degree, and sentenced to the penitentiary; a new trial being refused him, he appealed in error to this court. The matters assigned for error were the admission of the dying decla-

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rations of the deceased, and the competency of one of the jurors, as to both of which the facts are fully given in the opinion.

H. L. TURNER, VENABLE and KEROHEVAL, appeared for the prisoner.

SWAN, Attorney General, CARTER and COLYAR, for the State.

TOTTEN, J., delivered the opinion of the court.

The prisoner was charged by indictment, in the circuit court of Franklin, with the murder of Stephen Adams. He pleaded "not guilty," and at November Term, 1853, was tried and convicted of murder in the second degree. He moved for a new trial, which was refused, and judgment being rendered against him, he appealed in error to this court. The general character of the case may be stated in few words. Stephen Adams was some eighty years of age, and of feeble health; he had but one child, a daughter, who was married to the prisoner in the early part of 1852. The prisoner resided with Mr. Adams, and made a crop, aided by two slaves, the property of Mr. Adams. In September, 1852, the prisoner tied one of the slaves to a tree near the house, and whipped him; having him tied, he went to get more switches, and while gone for that purpose, Mr. Adams came to the slave and released him. The prisoner returned—a quarrel ensued between him and Mr. Adams, when the latter received the wounds of which he died about three hours thereafter.

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The wife of the prisoner was present, and witnessed the scene, but she of course, is incompetent to detail it. Another person, who seems to be a friend to the prisoner, was standing a short distance from the parties, but professed not to know how the homicide was committed. Mr. Adams was assisted to the house, and while lying in his bed, where he died, made the following declarations. He said to Mr. Wagner, who came to see him, "Willis (the prisoner,) has given me my deathly wound; has knocked me down with a stick, and I am badly beaten." He then called the negro slave; asked him if he was badly injured, and said to the slave, in presence of witness, Willis has given me my deathly wound; I expect I will die, and you will have to be hired out. *I want you to be good to my daughter.*

Again, he said to McElroy, "I know I cannot live; I am obliged to die; there is no chance for me to get over it."

He then said that the prisoner had knocked him down with a stick; had beaten him very much; and detailed the facts in substance, as before stated. While making these statements, he appeared to be in deep distress; breathed very badly; and complained of violent suffering in the head and breast.

1. It is insisted that the court erred in admitting the declarations of the deceased, to be given in evidence against the prisoner. The objection goes to the competency of the evidence, and that is a question to be determined by the judge, upon proof of the state of mind and condition of the deceased, at the time the declarations were made.

Now, were the statements of the deceased dying declarations, in a legal sense? Declarations made when

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the deceased is in *articulo mortis*, and conscious of the fact, are admissible as evidence. They must be made in view of impending and inevitable death; and being thus made, while in a condition so impressive; when there is no hope of time, and no motive of falsehood, they carry with them as high a guaranty for truth, as if made under oath. But declarations made merely in fear and apprehension of death, are not admissible. The mind must be convinced that death is impending and almost immediate. *Smith vs. State*, 9 Humph. R., 10. Now, testing these declarations by the rule we have stated, we are satisfied that they were properly admitted as dying declarations. We cannot doubt, in view of the condition and statements of the deceased, that he was fully impressed with the belief that his injuries were mortal, and that a speedy and inevitable death was impending.

2. It is said that William Perry, one of the jurors, had prejudged the case, and was therefore incompetent. To support this fact, two affidavits were produced, on the motion for a new trial; 1st. Oscar states that as he came to court with Perry, the morning he was taken on the jury, he asked him if he was not afraid to go to town? Perry replied, "no, I have formed my opinion as to the last case there is; and as to Brakefield, I believe he ought to be hung;" and Edwards states that he was in company with Perry on his way to the court, who enquired of him if he was not a witness in this case? Affiant replied that he was a witness for the State. Perry then said, alluding to the prisoner, "damn him, he ought to be hung." The prisoner states in his affidavit, that he had no knowledge of these facts when Perry was taken on the jury.

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It is well settled, "that loose impressions and conversations of a juror, founded upon rumor, will not, if disclosed by him, or others, to the court, have the effect to set him aside as incompetent. *Trowdale vs. State*, 9 Humph. R., 422; *Howerton vs. State*, Meigs' R., 262.

We are not disposed to disturb the doctrines of these cases; but was Perry's remark a mere loose impression, founded upon rumor? We think not. His statement is in the strongest terms of opinion, conviction and prejudice; he pronounces the prisoner as guilty, and guilty of the highest grade of murder. He stands clearly convicted of having prejudged the case. His examination upon his *voir dire*, before the court does not appear; his counter-affidavit is produced to explain the matter; but it is a settled rule that the affidavit of the offending juror cannot be relied on to exculpate himself, and prejudice the prisoner. *Hines vs. State*, 8 Humph. R., 602; *Luster vs. State*, 11 Humph. R., 170.

We are to presume that his statement before the court made him apparently competent as a juror; after the trial, he is accused upon the evidence of the witnesses, of having prejudged the case. The juror stands criminated before the court, and in such case his own affidavit cannot be credited or relied on, when it involves the rights of the accused. Other affidavits of jurors were made to the effect that Perry, the juror, was favorable to the prisoner on the trial. This fact, we regard as not pertinent to the issue, which is, was the juror competent? not what his conduct was after he was taken on the jury. If he was put to the prisoner as a competent juror, when in fact he was

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incompetent, the rights of the prisoner were violated, and it is a legal presumption that he was injured. These affidavits being out of view, the case rests simply upon the statement of the two witnesses, who fully convict the juror of having prejudged the prisoner; nor can we presume, in the absence of any legal proof, that his judgment rested merely upon rumor; but on the contrary, we are to presume that it was founded on facts and statements which he considered entitled to credit. A verdict thus tainted cannot be permitted to stand; the prisoner was entitled to an "impartial jury."

Let the judgment be reversed, and the prisoner be remanded for a new trial. Judgment reversed.

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N. & C. RAILROAD CO. vs. JOHN MESSINO.

1. COMMON CARRIER. *Of Passengers.* A common carrier of passengers is one who undertakes for hire, to carry all persons indifferently who may apply for passage. It is not essential that the fare should be paid in advance or tendered, to establish the relation and reciprocal duties of carrier and passenger; it is enough that it is understood that it is to be paid.
2. SAME. *Same.* To constitute one a common carrier, it is necessary that he should hold himself out to the community as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment. It is not, however, every carrying of passengers for hire, that constitutes a party a common carrier. A party having the conveniences for carrying persons, may in some or perhaps many cases carry passengers for hire, when done at the instance of passengers and for their accommodation, without incurring the respon-

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sibilities of common carriers. These would be private carriers, and held accountable under rules much less stringent.

3. *SAME. Liabilities of Railroad Companies.* A railroad company in engaging in the business of common carriers, undertakes that their road is in good traveling order and fit for use; and that the engines and carriages employed are road-worthy and properly constructed, and furnished according to the present state of the art, and if an injury results from the imperfection of the road, the carriages or the engines, the company are liable, unless the imperfection was of a character in no degree attributable to their negligence.
4. *SAME. Same.* Railroad companies are bound for a due application on the part of their servants and agents of necessary attention, art, and skill, to secure the safety of passengers; and they are liable for all injuries which may occur from the negligence or want of skill of their agents, if such injury might have been avoided by the utmost degree of care and skill on the part of their agents and servants.
5. *SAME. Same.* A railroad company is liable for any casualty which may occur from running with greater speed than is prudent, or on account of collisions with obstructions which the engineer or conductor saw or might have seen, or which he might have avoided by the most skillful and prompt use of all the means in his power.

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FROM DAVIDSON.

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This was an action of trespass on the case brought by John Messino in the circuit court of Davidson county, against the Nashville and Chattanooga Railroad Company for serious injuries done him by the car in which he was a passenger, running off the track in consequence of a collision with a cow in the month of June, 1851. It seems that the cars were placed upon the track in the winter of 1850-51, the road being only partially graded and the track laid but a few miles from Nashville. There was a deep cut necessary to be made through Rains' hill a short distance from the city, and until it was completed, a temporary track was laid on the side of the hill. It was impracticable to carry the engine

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over this portion of the road with a guard or "cow-catcher" in front of the engine, and therefore none was used on the engine at that period. The object of running the cars at that time was to transport materials on the road for its more speedy and economical completion, and no fare was charged passengers until it was found that their riding interfered materially with the employment of the workmen, and by the advice of the chief engineer, fare was demanded in order to reduce the number of travelers. No sort of accommodation or inducement was held out for persons to ride except on Sunday. There were no passenger cars attached to the locomotive, generally nothing but open cars loaded with iron or wood, and a few seats placed across them for persons to ride upon; sometimes a box car was also attached loaded with salt and other groceries for the hands or the neighbors in the vicinity of the terminus. It was not intended that any person should ride on the box car, but as there was no rule yet adopted or officers provided for their enforcement, passengers rode sometimes in this car. John Messino, the defendant in error, was an Italian, a painter and glazier, and a vendor of bird cages and statuettes. He and a fellow passenger took passage in the box car in June, 1851, with a load of his wares for sale in the country. It seems that one of the employees suggested to them that seats were provided in the open cars, but they preferred to remain in the box car because the morning was damp and the car covered. When the engine started, the passenger cars were in front and the box car in rear of the engine. After they reached Rains' hill, the engineer finding that he could not surmount the ascent with all the cars, let



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go the hindermost and pushed up those in front to the top of the hill, when he let them go and then went back after the other cars; he brought these also to the brow of the hill, and then started down with them at a pace which, though variously estimated by different witnesses, was entirely too fast for a proper caution and prudence. When he had gone but a short distance, a cow came upon the track some six or seven hundred yards from the top of the hill, and she was overrun by the engine and the box car, whereby the latter was thrown from the track and upset, and the defendant in error so injured and mangled thereby, that after much suffering, amputation of one of his legs became necessary. It appears that the engineer saw or could have seen the cow several hundred yards before him on the track, and no signal was given to the brakeman or effort made on his part to slacken the pace of the engine. The jury gave the Italian a verdict for \$5,000 damages, and the court (Judge BAXTER, presiding) refusing a new trial, the company appealed in error to this court.

ANDREW EWING, N. S. BROWN & TRIMBLE, for the company.

R. G. SMILEY and GEO. MANEY, for John Messino.

CARUTHERS, J., delivered the opinion of the court.

This action was brought to recover damages for a serious injury sustained by the defendant in error, a passenger, from a collision with a cow which threw off the car in which he was riding. The road was incomplete, and only used a part of the way from Nashville to Mur-

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freesboro' merely to facilitate the construction of the road, by transporting the iron and other materials from the terminus at Nashville east, as they progressed with the work. But freight and passengers were received and carried for pay, regularly and without refusal.

No solicitation of passengers or public notice in the newspapers or by hand-bills had been made, except for *Sundays*, but rates of charge had been fixed, and none who applied to be carried were refused. The arrangement, for passengers were very indifferent, and part of the road over which they run was in an unfinished state, so that the pilot or cow-catcher could not be attached to the locomotive. This is regarded as a precaution almost indispensable in this country, and without which the danger of accidents like the one which occurred in this case is very imminent. The jury in consideration of all these facts presented in the proof, found a verdict in favor of the defendant in error, and assessed his damages at \$5,000. It is not insisted that we can reverse for excessive damages, or upon the ground of a preponderance of evidence against the verdict, as there is proof to sustain it.

It is becoming more and more important every day that the duties and liabilities of common carriers, should be well understood by them and the public. The lives of citizens as well as their property, are committed to their keeping. The appalling disasters that are so frequently occurring, excites a general desire and expectation that the courts will hold them to that care and diligence, which the law prescribes for the safety and protection of all persons who extend to them their patronage. The rules on this subject are well defined

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and settled with a view to the mutual advantage of the parties.) If they were not sufficiently rigid to guaranty safety to the citizen, the carrier would lose employment, and fail to make profit enough to authorize the great expenditure and hazards attendant upon his undertaking. So it is manifestly to his interest, as well as that of those who avail themselves of the facilities he affords for traveling and transportation, that the most perfect safety should be secured. But on the other hand, the rules of accountability should be reasonable, that men may not be deterred from devoting their time, capital and energies to these very useful and now almost indispensable enterprises.

The law on this subject is wisely adapted to the accomplishment of those ends, and the promotion of the best interests of all concerned. It is laid down correctly, as we think, by his Honor the circuit judge, in his charge to the jury in this case. He says, in substance, "a common carrier of passengers is one, who undertakes for hire to carry all persons indifferently who may apply for passage. It is not essential that the fare should be paid in advance or tendered, to establish the relation and reciprocal duties and liabilities of carrier and passenger; it is enough that it is understood, that it is to be paid.

To constitute one a common carrier, it is necessary that he should hold himself out to the community as such. This may be done, "not only by advertising, &c., but," by actually "engaging in the business and pursuing the occupation as an employment. It is not, however, every carrying of passengers for hire that constitutes a party a common carrier. A party having the conveni-

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ences for carrying persons, may in some, or perhaps in many cases carry passengers for hire, when done at the instance of the passengers and for their accommodation, without incurring the responsibilities of common carriers."

These would be private carriers, and be held accountable under rules much less stringent. When a railroad company engage in the business of common carriers, they undertake that the road is in good traveling order and fit for use; and that the engines and carriages employed are road-worthy, and properly constructed and furnished according to the present state of the art, and if an injury results from the imperfection of the road, the carriages or the engines, the company are liable unless the imperfection was of a character in no degree attributable to their negligence. They are also bound for a due application on the part of their servants and agents of the necessary attention, art, and skill, and if the injury to the plaintiff might have been avoided by the utmost degree of care and skill on the part of the agents and servants of the company they are liable." He further charges, "that if the injury occurred by running faster than a prudent, skillful conductor would have run on that part of the road, or on account of coming in collision with an obstruction which the conductor saw, or might have seen if he had been looking in a proper direction, or which he might have avoided by the most skillful and prompt use of all the means in his power, the defendant would be liable."

In this charge we see no error, and the jury having found the defendant liable as common carriers, under a correct exposition of the law in reference to the facts,

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we cannot disturb their verdict, although we might differ with them in our conclusions upon the facts.

It is, however, urged that the charge is not full enough, although it is correct as far as it goes. We have several times announced the rule, that we will not reverse on this ground, where there is no application for the extension of the charge. The court must be put in the wrong by charging what is not law, or refusing upon request to charge the whole law, applicable to the facts of the case.

It is again insisted that the court erred, on questions of evidence. He permitted the plaintiff to prove that the engineer in charge of the engine on that day, was heard to say either before or after the accident, "that he would make his engine make her time, or blow her to hell." This remark was made by one of the agents of the company in connection with his employment, and might be a circumstance to show his rashness or unfitness for so important a position, and tends to prove the cause of the disaster. Whenever it is admissible to prove what an agent did, it is competent to prove what he said about the act while he was doing it. 1 Greenl., 213.

We cannot say that it was an improper circumstance to go to the jury, nor that they permitted it to have an undue influence upon their minds as has been argued. Again, it is objected that the court refused to permit the defendant to prove the account given by the engineer to his chief in half an hour afterwards, of the manner and cause of the accident. This was not a part of the *res gesta*, and therefore incompetent.

The judgment will be affirmed.

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James Pharis vs. William Lambert.

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JAMES PHARIS vs. WILLIAM LAMBERT.

1. EVIDENCE. *Witness. Interest.* In an action for malicious prosecution, where the plaintiff relies upon a peace warrant, sworn out by the defendant against him, and upon which he was arrested, as the foundation of the action, it is competent for the plaintiff, or his security for costs, to show by affidavit the loss of said warrant, but neither can be allowed to prove its contents further than is necessary for identification, as such proof goes to the merits, and must come from a disinterested source.
2. SAME. The valuable rule that the best evidence within the power of the party shall be produced, admits of no evasion. So where, in proving the loss of a peace warrant which was the foundation of an action for malicious prosecution, it was shown that said warrant was last in the hands of one of the plaintiff's counsel, it is indispensably necessary, before proof can be heard of the contents of said warrant, that said counsel should be sworn, if in reach of process, to account for the non-production of said warrant.
3. MALICIOUS PROSECUTION. *What is prima facie evidence of a want of probable cause.* When a peace warrant is taken out, and the defendant arrested, and upon an examination of the facts by the magistrate they are deemed insufficient, and the defendant is discharged, such discharge would be *prima facie* evidence of the want of probable cause for said prosecution, and where coupled with malice would sustain an action for malicious prosecution, unless rebutted successfully by proof that there was reasonable ground for the apprehension of damage to person or property on which the proceeding was instituted. But where the magistrate, on investigation of the facts, binds the defendant to appear at court, and the prosecutor merely fails to appear and ask that he be rebound, and the defendant is thereupon discharged — this is not such an acquittal as is contemplated in the rule, and raises no such presumption of the want of probable cause.
4. SAME. *What necessary to authorize the action.* In order to authorize an action for malicious prosecution, it must appear: 1, that the prosecution is ended; 2, that there has been an acquittal or final discharge; 3, that the charge was made through malice, and without reasonable or probable grounds to believe it true. Malice may be inferred from the want of any reasonable grounds for the prosecution, as the circumstances appeared to the prosecutor, or as they would have appeared by ordinary circumspection and diligence on his part at the time he acted.

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FROM JACKSON.

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Pharis, the plaintiff in error, prosecuted Lambert by indictment in the circuit court of Jackson for arson,

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in burning his corn crib, of which Lambert was acquitted. Pharis also took out a peace warrant against Lambert, who was arrested, taken before a magistrate, and required to give sureties of the peace, and for his appearance at the next term of the circuit court, which he did. Pharis did not appear at the circuit court to prosecute his peace warrant, and Lambert was discharged, whereupon Lambert brought this action for malicious prosecution and false imprisonment against Pharis in the circuit court of Jackson. The declaration contains two counts; one on the prosecution for arson, and the other on the prosecution by peace warrant. At the May Term, 1853, Judge GOODALL, presiding, there was a verdict for Pharis on the first named count, and against him on the second, assessing Lambert's damages at \$400, upon which there was judgment, from which Pharis appealed in error to this court. The testimony and the part of the charge, excepted to so far as necessary to illustrate the opinion, are stated in the same.

S. TURNER and A. M. SAVAGE for the plaintiff in error.

M. M. BRIEN and SPURLOCK, for the defendant in error.

CABOTTERS, J., delivered the opinion of the court.

This is an appeal in error from the circuit court of Jackson county. The action was for a malicious prosecution, and a recovery of \$400 damages.

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The first error assigned is upon a question of evidence. The plaintiff below was permitted to introduce parol evidence of the contents of a peace warrant upon his own affidavit; that it had been lost or mislaid; that he has caused his counsel and the clerk of the court to make diligent search for it; and that his counsel, having it before him when he drew the declaration, has correctly recited it therein; and the evidence of the clerk of the court, that he had made diligent search for it in his office, but could not find it; "and that Mr. Spurlock, plaintiff's attorney, took said warrant out of the office, and he had not seen it since." The affidavit of Spurlock was then read, and decided by the court correctly to be competent to show the loss, although it was objected to on the ground that he was security for the cost. The affidavits of a party being competent, surely the interest of his security for costs does not render *him* incompetent. But all that either can be allowed to prove is the loss of the papers, not their contents any further than may be necessary for description or identification; the secondary evidence of the contents, goes to the merits, and must come from disinterested witnesses.

But the plaintiff withdrew the affidavit of Spurlock, and without that the court allowed proof of the contents of the lost papers to go to the jury. In this we think there is error. Both the plaintiff and the clerk state that the papers were last seen by them in the hands of Spurlock. This rendered it indispensably necessary that the latter should be sworn, and account for their non-production, if in reach of process. 1 Greenleaf, § 558, page 706-7. If this was not necessary, it is easy to see how the valuable and primary rule of



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evidence, that the *best* evidence in the power of the party shall be produced, might be evaded.

2. It is insisted that there is error in the charge of the court, for which we should reverse. The parts of the charge objected to is in these words: "If the defendant, maliciously and without probable cause, prosecuted the plaintiff upon a peace warrant, and he was arrested, tried and acquitted on said warrant, the plaintiff would be entitled to recover; that if the plaintiff was tried upon the peace warrant and acquitted, such acquittal would be *prima facie* evidence of want of probable cause, but might be rebutted by evidence showing that defendant had reason to fear, and did fear that Lambert would do him some harm or injury." This is not correct in its application to the facts of the case before the jury. The prosecution, if it may be so called, was successful before the justice of the peace; he decided that the grounds laid were sufficient, and bound Lambert to appear at the next term of the circuit court, and to keep the peace in the meantime; but when the court came on, he did not see fit to make application to bind him longer, and he was of course discharged. This is the acquittal referred to in the charge, and to which the rule of the law laid down was applied. If a peace warrant be taken out, the defendant arrested, and upon examination of the facts they are found insufficient, and he is discharged, this would be *prima facie* evidence of want of probable cause, and when coupled with malice, would sustain the action for malicious prosecution, unless successfully rebutted by showing reasonable grounds for the apprehension of damage to person or property on which the proceeding was instituted;

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but here the action of the magistrate was in favor of the prosecution, and if any presumption would arise, it would be in favor of the existence of probable cause, instead of against it; but his Honor doubtless had reference to the disposition of the case in the circuit court, and must have been so understood by the jury. Here, the prosecutor making no application to continue the peace recognizance, the defendant was discharged. This cannot be regarded as an acquittal so as to have the force of raising the presumption of want of probable cause. It was, however, proper evidence to show another fact material for the plaintiff to establish; that is, that the prosecution was *at an end*. 2 Greenleaf, § 452. In a criminal prosecution, that is, a charge made in the name of the State by warrant, presentment or indictment, that the defendant has committed some criminal act, the rule is, that in order to authorize a civil action for damages against the prosecutor, it must appear: 1, that the prosecution is ended; 2, that there has been an acquittal or final discharge; 3, that the charge was made through malice, and without reasonable or probable grounds to believe it true. The first and second requisites may be established by records of the courts; but that record in this case, was not even *prima facie* evidence of the third, as charged by his Honor; it could not tend at all to prove a want of probable cause; was not even a circumstance from which it could be inferred. Malice may be and generally is inferred, and that correctly, from the want of any reasonable ground for the prosecution as the circumstances appeared to the prosecutor, or as they would have appeared by ordinary circumspection and diligence on his

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part at the time he acted. We refrain from saying anything about the facts of this case, as it will have to be again tried. But for this error in giving undue force to the facts of the discharge of the plaintiff from the recognizance to keep the peace by the circuit court, because the defendant did not desire to bind him further, and for the admission of secondary evidence of the contents of papers, without their loss being sufficiently accounted for, we reverse the judgment and remand the cause.

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W. T. ROBERTS vs. ROBERT CROSS.

1. *STAY OF EXECUTION. Liability of Stayor.* The stay of execution is in effect a confession of judgment, and the stayor is liable under the law applicable to such judgment and not otherwise. It cannot be for a part of the debt only or for a greater or less term than that limited by law, or otherwise varied from the general rule.
2. *SAME. Same.* A conventional stay of an execution which varies from the general law is a mere contract, and not the final and conclusive judgment which the law contemplates. So where a stayor consented to stay the whole debt for a shorter period than the eight months allowed by law, he incurred the obligation of stayor, but no execution can be issued against him until the full period of eight months has elapsed.

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FROM MAURY.

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This was a proceeding by *certiorari* in the circuit court of Maury, brought by the defendant in error as

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term than that limited by law, or otherwise be varied from the general rule. Here the execution, issued in about four months after the judgment, when the law allows eight months stay of execution, if "good and sufficient" security be given, and a question is raised whether the stayor can consent to a less time. He and his principals were entitled by law to the eight months stay, and it was not competent to prove that they consented to a less time.

If a different obligation were intended, it is not a case under the stay laws, but the subject of contract in some mode proper to its nature.

We think the defendant incurred the obligation of stayor, and after the time allowed by law for the stay, he became liable to an execution.

The action of the circuit court, quashing the judgment against the stayor will be reversed, that, quashing the execution will be affirmed, and a *procedendo* will issue to the justice.

Judgment reversed.

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B. B. Stevens, et al. vs. The Duck River Navigation Co.

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B. B. STEVENS *et al.* vs. THE DUCK RIVER NAVIGATION CO.

1. SHERIFF. *Deputy can administer oaths where sheriff authorized by law to do so.* Where by law the sheriff in the execution of a writ of *ad quod damnum* is authorized to empanel and swear a jury; such acts being ministerial merely, may be performed by a deputy.
2. EVIDENCE. *Before jury of view under a writ of ad quod damnum.* Where a charter authorizes the assessment of damages against the corporators for injuries done to land in carrying out the purposes of the same, by a jury who are required to "go on the premises" and assess the damages thereto, such jury have no right to examine witnesses, but the jurors themselves are the witnesses respecting the facts in question, and their report must be based upon their own estimate of the damages after a personal inspection of the premises.
3. CHARTER. *Construction. Abandonment of franchise. Its effects upon the rights of riparian owners as to damages.* The charter of the Duck River Slack Water Navigation Company authorizes the erection of locks and dams to effect the purposes of the same, and gives to the owners of land overflowed by the erection and continuance of any such dam, a summary remedy for the assessment of their damages by a jury of view, whose report is to be returned to the circuit court and judgment had thereon; and provides that the court may, at the same time, condemn and vest such land as may have been overflowed, and for which damages have been assessed in said corporation, upon the payment of the value assessed to the party entitled thereto, or into court for his use: *Held*, that an abandonment in good faith by the company of the scheme contemplated in the charter, and removal of the cause of injury, established by evidence of a character, to bind the company, made at any time before the final judgment upon the report of the jury, would take away the right of the party injured to insist upon the value of his property and transfer of title, and leave him to recover such damages under all the circumstances of the case, as he may have sustained by the erection of such dam during its continuance.

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FROM MAURY.

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This is a proceeding upon a writ of *ad quod damnum* in the circuit court of Maury. The plaintiffs were owners of certain mills near the town of Columbia, which were overflowed and injured by the erection

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of a dam below the same by the defendants, in pursuance of their charter. This proceeding was instituted to have the damages of the plaintiff assessed by jury under the provisions of the charter of defendants. The jury assessed the plaintiff's damages at \$4,000, and made return thereof to the circuit court, which gave judgment thereon for the plaintiffs, (MARTIN, Judge, presiding,) from which the defendants appealed. The main questions presented, involved the construction of the charter of the defendants; the material provisions of which, as well as the facts, are so fully given in the opinion that it is unnecessary to reiterate them.

M. S. FRIEESON for the plaintiffs.

J. H. THOMAS, for the defendant.

McKINNEY, J., delivered the opinion of the court.

By an act of the Legislature, passed 15th January, 1846, the Duck River Navigation Company was incorporated, with full power and authority to make Duck river navigable from Columbia in Maury county, to the Tennessee river, by means of locks and dams." Section ten of the act of incorporation provides: "That if any person shall conceive himself injured by said corporation taking his timber, rocks or other materials, or digging, or flooding his land or other property, by the construction of said improvements, he or they may apply to the circuit court of the county in which the injury may be done, for a writ of *ad quod damnum*, to be directed to the sheriff of such county, to em-

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panel a jury of free holders to go on the premises, and upon oath, (which oath the sheriff is hereby authorised to administer,) assess the amount of damages which may have been sustained; and the court shall, upon the return of such assessment, render judgment, and award execution for the same, with costs." In a subsequent part of the same section it is provided, that "the said court may, at the same time, condemn and vest such lands as may have been overflowed, and for which damages have been assessed, in said corporation, upon the payment of the value assessed to the party entitled thereto, or into the court for his use."

The company having been organized under this charter, proceeded to erect a dam across Duck river, about eleven and a half miles, (by the course of the river,) below the town of Columbia, which was completed and the gates of the lock closed about the month of June, 1852.

Stephens & Davis, who were the owners of a grist mill and saw mill situate on Duck river, about half a mile above the town of Columbia, made an application to the circuit court of Maury for a writ of *ad quod damnum*, upon the alleged ground that the erection of said dam had greatly injured them, "by backing up the water and flooding and drowning said mills, and rendering their said mills wholly useless and unprofitable." The writ accordingly issued, commanding the sheriff to summon a jury of twelve freeholders, to go upon the premises "and assess upon oath the amount of damages which the said plaintiffs have sustained by reason of the premises aforesaid."

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This command of the writ was in strict conformity to the prayer of the petitioner, presented to the court for the issuance of said writ.

The jury reported, that, having been empaneled and sworn by William R. Porter, a deputy sheriff of Maury county, and having gone upon the premises in the writ specified, "and after having fully examined the same in the presence of the counsel of the plaintiffs and defendant; and after hearing the proof on both sides, and having fully considered of the whole matter, we do find in favor of the said plaintiffs, and assess the damages they have sustained by reason of the dam of said plaintiffs, to be the sum of four thousand dollars, by reason of the backing of the water upon the mills and machinery of said plaintiffs, for the time that the charter of said defendants authorises them to keep up said dam, in and across said river, below said mills and dam of said plaintiffs," &c. And thereupon the court rendered the following judgment: "It is considered by the court that said verdict of the jury aforesaid, be received, and that the plaintiffs recover of the defendant their damages aforesaid, by the jury in manner and form aforesaid assessed, also their costs in this behalf expended," and that execution issue, &c. Upon the assessment of the jury being returned into court, and before judgment thereon the defendant by counsel, entered a motion to set aside and quash the same. And in support of this motion the defendant produced a copy of a bill pending in the chancery court at Columbia, filed by a large number of the stockholders, praying, amongst other things, a dissolution of said com-



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pany, because of the utter impracticability of the object contemplated by the charter. Also a series of resolutions passed by the board of directors of said company at a meeting held on the 12th of May, 1853, which, among other things, declare "it inexpedient for the company further to prosecute the work, or attempt to render said river navigable by the erection of locks and dams; and that the board will abandon all further efforts to make said river navigable;" and furthermore directing the gates of the lock, at the dam complained of, to be forthwith opened, and the dam itself to be removed, or cut down so as not to cause the water to back upon the property of persons above.

These resolutions were adopted subsequent to the assessment of damages by the jury, which was made on the 22d of April, 1853, but prior to the return and confirmation thereof by the court, which was on the 27th of May, 1853.

The defendants also presented to the court several affidavits, and among others, the affidavit of one of the jurors, which states that the jurors made their assessment of damages "more from the proof introduced than from any examination made by themselves," and that they met at the mills, and did not go to the dam erected by the defendant, or make any examination of it whatever."

It was made to appear by another affidavit, that the defendant objected to the examination of witnesses before the jury, but *the deputy sheriff overruled the objection*, and the witnesses were examined touching the damages which, in their opinion, had been occasioned to the plaintiff's mills, by the erection of said dam.

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It was also disclosed to the court, that within a day or two after the passage of the foregoing resolutions, the gates of the lock were opened and remained open, and that since the gates were thrown open, the back-water does not extend within some considerable distance of the plaintiff's mills. The affidavits disclose other important facts, which, however, for the purpose of the present decision, need not be noticed.

Upon the foregoing state of facts, it is insisted that the motion to quash ought to have been made absolute, for several reasons:

1. It is argued that the charter, in express terms, requires the writ "to be directed to the sheriff of the county," and confers upon him alone the authority to empanel the jury and administer the oath; and consequently these duties cannot be discharged by a deputy, as was done in this case.

We are not prepared to assent to this conclusion. It seems to us that the impanneling the jury and administering the oaths are mere ministerial acts, and may therefore be performed by a deputy.

2. It is maintained that the assessment of the jury was illegal, and should have been treated as a nullity, because made in whole or in part, upon the testimony of witnesses, and not exclusively upon their own observation and knowledge. This position, we think, is unquestionably correct. The charter provides that the jury shall "go on the premises." No provision is made for the attendance or examination of witnesses, and obviously no such thing was contemplated. The act clearly contemplates an inquiry and assessment of the damages, in the primitive form of trial by jury;

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according to which the jurors themselves were the witnesses respecting the facts in question, and their verdict was founded upon their own knowledge, without the aid of other testimony. The injuries for which the charter provides a remedy, are supposed to be objects of sense, and therefore it was intended that the jury, upon the testimony of their own senses, should estimate the damages sustained in the particular case, unaided by the opinions or evidence of witnesses. This is in analogy to the ancient proceeding in real actions, when a view of the premises was thought necessary. See the case of the *Clarksville Turnpike Company vs. Atkinson*, decided at the last term at this place.

Whether this is not an impracticable and inadequate remedy in the present case, and whether the act is essentially objectionable in not providing for a revision of the assessment in the circuit court, in the ordinary mode of trial, are questions not for our consideration.

3. It is urged that the assessment ought to have been set aside, because the jury, instead of estimating the damages actually sustained, up to the time of making the assessment, (as by the terms of the act, as well as by the command of the writ, was their duty,) gave *prospective* damages, covering all future loss and injury.

In answer to this objection, it is said, that in point of fact, the measure of the damages assessed by the jury was the estimated value of the property, and that as, by the provision of the charter, the owners had a right to force a sale of the property upon the company, the assessment was substantially what it ought to have been.

In the first place, it may be remarked, this is a view of the case not warranted either by the report

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of the jury or the action of the court thereon. Even admitting that this was a case in which it would have been competent to the jury to have made the value of the property the basis of their assessment of damages, it is sufficient to say, that from this report, there is no ground to infer that they in fact did, or intended to do so. Nor did this view present itself to the mind of the court, or provision would have been made in the judgment, pursuant to the charter, that the title to the property should be vested in the company upon "the payment of the value assessed," to the owners, or into court for their use.

It does not become necessary for the decision of the present case, that we should attempt to expound the charter with the view of defining the precise character of the cases intended to be embraced by it; for in the argument for the defendant here it is conceded that the case in hand falls within it; and perhaps it is within the reason, if not within the letter of the act.

It seems to be assumed by the counsel for the plaintiffs, that in all cases of injury to property, resulting from the erection of a dam or other improvements made by the company, whether such injury be only partial, or amount to a total destruction of the value of the property; the owner has a right, by the provision of the charter, to demand an assessment of the full value of the property by the jury, and a compulsory sale thereof to the company, by the judgment of the court, and this right, becoming fixed by the assessment made by the jury, it cannot be affected by the subsequent act of the company, though amounting

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to an entire abandonment of the project contemplated by the charter, and a complete removal of the cause of injury by the abatement of the dam, or throwing open the lock.

We cannot assent to this reasoning. On the contrary, we think that an utter abandonment of the contemplated scheme of improvement, in good faith, at any time before the final judgment of the court upon the report of the jury, would take away the right of the party injured to insist upon the value of his property, and transfer of the title to the company; and leave him to recover such damages, under all the circumstances of the case, as he may have sustained by the erection of a dam, during its continuance. Of course, in such case, the abandonment of the enterprise, and total removal of the cause of injury, must be established by plenary evidence, and the evidence of abandonment must be of a character to be in law, binding and conclusive upon the company.

In this view of the case, it follows, that the judgment must be reversed, the proceedings set aside, and a writ of *ad quod damnum* issued *de novo*.

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Jenkins Greer vs. T. C. Wroe and Wife.

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## JENKINS GREER vs. T. C. WROE AND WIFE.

**FORCIBLE ENTRY AND DETAINER.** Where the plaintiff in a proceeding in forcible entry and detainer, had removed from the premises, but indicated by barring the doors of the house that he had no intention of abandoning the place, and afterwards casual trespassers entered by force and held possession for a while, and on leaving the same left the doors open, when the defendant without concert with the trespassers was put in possession under a claim and without force, he is not liable to the summary remedy of forcible entry and detainer, but only to an action by which the strength of title can be tested.

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FROM DE KALB.

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Wroe and wife instituted this proceeding in forcible entry and detainer, before three justices of the peace in the county of DeKalb, against the plaintiff in error Greer, to recover the possession of a tract of land in said county. There was judgment before the justices for Wroe and wife, from which Greer appealed to the circuit court. It seems that the land in controversy was sold at execution sale, as the property of Mrs. Wroe then in possession and a *feme sole*, Messrs. Savage & Brien becoming the purchasers. Soon after the sale she intermarried with Wroe, and removed to Wilson county, leaving the premises unoccupied. She requested Mr. Colms, her attorney, to look after the place, and he soon thereafter barred up the doors and windows of the house and fastened the gate. Some trespassers entered the house by force, and held possession until driven off by Mr. Colms. They left the doors, windows, and gates all open, and thereupon Greer went into possession without concert with said trespassers, and by authority of Savage

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Jenkins Greer vs. T. C. Wroe and Wife.

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one of the claimants under the sheriff's deed ; this proceeding was thereupon instituted by Wroe and wife, the period for redemption not yet having expired. There was verdict and judgment in the circuit court, Judge GOODALL, presiding, for Wroe and wife, from which Greer appealed.

M. M. BRIEN and SAVAGE, for the plaintiff in error.

COLMS and CANTRELL, for the defendant in error.

CARUTHERS, J., delivered the opinion of the court.

This is a proceeding in forcible entry and detainer. The case turns upon a single question of law, contained in the charge of the court. The law was charged to be that, "if the plaintiff had removed from the place, but indicated by fastening the doors of the house, and the gates of the enclosure, that they did not intend to abandon the possession, and a casual trespasser opened the gates and doors, and the defendant afterwards even without any concert with the trespassers, finding the house open entered under a claim, and without actual force, that he would be liable to be proceeded against in this action." Under the facts of the case there can be no doubt, but that the charge on this point controlled the verdict. We think the charge was erroneous. The entry in such a case would not be forcible in fact or in law, in the sense of the statute giving this action, and therefore the defendant would not be liable to this proceeding, but only to an action in which the strength of title could be tested. True, he would be guilty of an ouster,

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Alexander Jenkins *vs.* W. W. Motlow.,

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if not the true owner, and subject to an action of trespass or ejectment, but not to forcible entry and detainer. It can make no difference by what means and by whom the houses were opened, if the defendant cannot be connected with it. An entry by him peaceably and without force or violence, does not render him liable to this summary remedy. If he finds the premises vacated, and the houses opened, the idea of force surely cannot be connected with his entry. How the means by which the premises became vacant could affect the question, we are unable to perceive, unless it should appear that the trespasser was acting for him, or by his concert or procurement, in which case, the force would be imputed to him and he would be liable.

The judgment will be reversed, and cause remanded.

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ALEXANDER JENKINS *vs.* W. W. MOTLOW.

**BAILER.** *Carrier. Liability of mandatary.* Where the defendant, a captain of a steamboat, undertakes without charge to carry a sum of money for one of his passengers from one point to another, he is bound to use a degree of diligence and attention adequate to the performance of the trust, and if he be wanting in that ordinary care applicable to his situation, character and circumstances, whereby the money is lost, he is guilty of negligence, and is liable to make indemnity for such loss.

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FROM DAVIDSON.

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This action on the case was brought by the defendant in error against the plaintiff in error, in the cir-



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Alexander Jenkins vs. W. W. Motlow.

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cuit court of Davidson to recover a sum of money deposited with the plaintiff in error by the defendant, to be carried to New Orleans on the steamer Jamestown, of which the plaintiff in error was master, and which was lost by the robbery of the boat. It appears that Motlow took passage at Paducah on the steamer for New Orleans. Some several hundred miles above New Orleans, he was advised to deposit his money, some \$650 in gold, in the iron safe of the boat, which he did, handing it to the clerk, and demanding a receipt therefor, which the clerk declined to give, stating that he carried it without charge, and that it would be as safe as in the Nashville Bank. The boat arrived at New Orleans on Thursday morning before day, and the safe was robbed on Friday afternoon. It seems that before the deposit was made the clerk had advised the passengers that they had better place their money in the safe, as there were suspicious persons on board, and several others, with Motlow, had done so accordingly. On the night of their arrival at New Orleans, boats lying on each side of the Jamestown had been robbed. The captain employed an extra watch, but at the time the robbery was discovered he could no where be found. On Friday, the day of the robbery, it seems that all the officers of the boat were out upon the levee most of the day. The clerk, when he left the boat, locked the safe, taking the key with him; he also locked his office door, but it seems the door of the adjoining room was left unlocked, and that room communicated with his office, where the safe was, by a space over the desk, sufficiently large to admit the body of a man. There was a dense crowd about the boat and on the

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Alexander Jenkins vs. W. W. Motlow.

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levee during the day of the robbery. It seems that the robbery was discovered about 4 o'clock in the afternoon, the desk having been apparently opened with a nail, by which it was much scratched about the key hole. There was verdict and judgment in the circuit court, Judge BAXTER, presiding, for Motlow, from which Jenkins appealed in error to this court.

MEIGS and MoEWEN, for the plaintiff in error.

A. EWING, for the defendant in error.

TOTTEN, J., delivered the opinion of the court.

Action on the case. In January, 1851, the plaintiff in error, Jenkins, being commander and owner of the steamboat Jamestown, then on a trip from Nashville to New Orleans, received the plaintiff Motlow on board as a passenger to New Orleans. The defendant in error deposited with the clerk of the boat \$650 in gold, and one Oliver, his companion, made a similar deposit of \$1,188 50.

When the boat arrived at New Orleans, the safe in which the money was deposited was opened and the money stolen. The plaintiff was to pay for his passage, but it was understood that no extra or special charge was made for carrying his gold. This suit was instituted to recover the lost money. There is much proof as to the circumstances attending the deposit; the condition of things at the time of the arrival of the boat at New Orleans; the danger of the robbery, and the loss of the money in the present case; but we do not deem

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Alexander Jenkins vs. W. W. Motlow.

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it necessary to detail it, as the evidence is sufficient under the rule of this court to support the verdict.

His Honor the Judge, instructed the jury that if the plaintiff in error was to carry the money without reward, he was liable only as a mandatary, and stated the degree of diligence which the law imposed on a bailee of that kind. He said, "there are three degrees of diligence required in the law; there is a high degree, a common degree, and a slight degree; and a mandatary was liable only for gross negligence, and illustrated the subject by reference to cases in a work on bailments.

The jury found the following verdict in writing: "We of the jury hold that the defendant is liable to the plaintiff as mandatary or depository, and that having failed to use ordinary diligence under the circumstances, we find for the plaintiff six hundred and thirty dollars, with interest, as damages, making in all \$770 50.

On this verdict there was judgment for the plaintiff, and defendant appealed in error.

The error assigned is, that the verdict of the jury holds the defendant bound to a higher degree of diligence than that which the law imposed upon him as mandatary.

Now, we may observe that this is not a special verdict which finds the facts, and submits the question of law thereon to the court. It states no facts, but a general conclusion, with some reasoning thereon, that the defendant is liable, and that reasoning in a technical sense, may be incongruous and erroneous; but does that prove that the general finding is erroneous?

We have seen that the evidence was sufficient to support the verdict, under the well settled rule of the

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Alexander Jenkins vs. W. W. Motlow.

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court; the instructions given by the judge are technically and strictly correct. He stated to them that a mandatary was bound to *slight diligence*, and liable only for gross negligence, and illustrated the subject in a clear and ample manner. The jury say that defendant, a mandatary, did not use "ordinary diligence under the circumstances."

We do not suppose that in the use of this phrase, the jury had reference to technical distinctions, which to their minds were not very obvious or tangible. The question was, whether the plaintiff in error, under the circumstances, was guilty of culpable negligence? That is, in technical phrase, whether he was guilty of "gross negligence?" It is conceded in many of the cases that this expression has no very precise or definite meaning. Thus in *Hinton vs. Dibbon*, 2 Adol. and Ell., 646. Denman, C. J., says it may well be doubted whether between "gross negligence" and negligence merely, any intelligible distinction exists. So in *Wilson vs. Butt*, 11 M. & Weld., 113. Rolf, B., remarks: "I can see no difference between negligence and gross negligence; that it was the same with the addition of a vituperative epithet." So in *Tracey vs. Wood*, 3 Mason, 132: The court said that gross negligence is the want of that care which unpaid bailees of ordinary prudence usually take of bailed property, and the jury were instructed to consider whether the party used such diligence as a gratuitous bailee ought to use, under such circumstances. Angel on Carriers, S. 31; and so Mr. Kent, a gratuitous bailee is liable, if he be "wanting in fidelity, or in that ordinary care applicable to his situation, character

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Alexander Jenkins vs. W. W. Motlow.

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and circumstances which is evidence of it." 2 Kent, 567.

In *Kirtland vs. Montgomery*, 1 Swan's R.. 457, the court say, that "as a general rule a mandatary, whose engagement is merely gratuitous, is bound only to ordinary diligence, and liable only for gross neglect or a breach of good faith. It is, however, a well settled rule, that if a mandatary enter upon the execution of the business entrusted to him, he is bound to use a degree of diligence and attention adequate to the performance of his undertaking, if he do not and damage ensue, he is liable to the mandator for his misfeasance."

The word *ordinary* in this extract, is not technical or correct, but the rule as to the liability of a gratuitous bailee is clearly and truly stated. In that case the court further say, the question is whether the defendant who had undertaken to deliver the package, used a degree of diligence and attention adequate to the performance of the trust? Now, in the present case, the defendant having undertaken to carry the money, was bound to use a degree of diligence and attention adequate to the performance of the trust, and in the words of Mr. Kent, if he were wanting in that "ordinary care applicable to his situation, character and circumstances," he was guilty of negligence and is liable to make indemnity to the plaintiff.

We see no reason to doubt, but that it was in this sense the case was considered by the jury, when they say, "the defendant failed to use ordinary diligence under the circumstances."

The circumstances alluded to by the jury, show that the boat was in imminent danger of robbery. There

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Arthur Ferguson vs. Shepherd & Gordon.

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was a vast concourse of visitors in the city. Two boats near the Jamestown had just been robbed; other robberies were committed in the city. Suspicious persons were on the boat, when it arrived and had gone into the city. The thief entered the boat in the day, opened the safe, and went out on the levee side, where the officers were engaged on the levee, the extra watch employed for the boat was no where to be found, and was not examined as a witness. These are some of the circumstances, in view of which the jury say, the defendant failed to use ordinary diligence to keep the funds, which the plaintiff for greater security had entrusted to his care.

We are of opinion that the judgment ought to be affirmed.

Judgment affirmed.

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ARTHUR FERGUSON vs. SHEPHERD & GORDON.

**PARTNERSHIP.** *One partner using firm's name in a contract without the scope of the partnership business. Evidence of assent.* Where a partner uses the name of the firm in a transaction without the limits of the partnership business; the fact that the other partner remains silent or fails to dissent from the contract, while it would be a circumstance proper to go to the jury, tending to prove assent previous or subsequent, yet it would not be conclusive as fixing his liability as a matter of law.

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FROM MAURY.

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This action of assumpsit was instituted by Shepherd & Gordon against Ferguson, in the circuit court of

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Arthur Ferguson vs. Shepherd & Gordon.

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Maury, upon two promissory notes purporting to have been executed by Treadway & Ferguson. It seems that the notes were given for goods purchased by Treadway in the name of himself and Ferguson as partners in trade. Ferguson plead *non est factum*, and introduced evidence tending to show that the contract by Treadway was without his authority, and not within the scope of the partnership business. The case was submitted to a jury of Maury at the August Term, 1853, before Judge BAXTER, presiding, when there was verdict and judgment for Shepherd & Gordon, from which Ferguson, his motion for a new trial being refused, appealed in error to this court.

M. S. FRIERSON, for the plaintiff in error.

S. D. FRIERSON, for the defendants in error.

CABUTHERS, J., delivered the opinion of the court.

This was an action of assumpsit upon two promissory notes, one dated November 7th, 1850, for \$545 95, and the other for \$510 02, dated 21st of February, 1851, both at six months, and signed "Ferguson & Treadway." The defendant Ferguson, plead *non est factum* and other pleas. The notes were given for goods purchased by Treadway, and signed by him, and the only question is whether Ferguson is bound as a partner of Treadway?

One new trial has been granted to each party, and the third verdict and judgment was in favor of the plaintiff's against the defendant Ferguson, who has appealed to this court.

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Arthur Ferguson vs. Shepherd & Gordon.

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We would not grant another new trial upon the facts under the rule of this court upon that subject, but it is contended that there are errors of law in the charge of the court, which operated injuriously to defendant.

The court charged that if Ferguson authorised Treadway to use his name in the grocery business alone, and he transcended his authority, and purchased dry goods in the name of the firm, and executed the firm's notes, then, when such facts came to the knowledge of Ferguson, it was his duty, within a reasonable time, to be judged of by the jury, to *notify* the plaintiffs that he would not be responsible, "and if he failed to do so, he would be bound." This is not the law. In such a case, Ferguson would not be bound, unless he assented to the use of his name. Remaining silent or failing to dissent from the contract, made by his partner outside of their business, would be a circumstance to prove assent previous or subsequent, but would not be conclusive as fixing his liability as a matter of law.

Where a note is given by one partner in the name of the firm for his private debt, or which is the same thing, in a transaction unconnected with the partnership business, and known to be so by the person taking it, the other partners are not bound, unless they have consented. Story on Part., p. 208. 2 Cain's, 246. 11 Johns. R., 544; 19 *Id.*, 154. 1 Humph., 30.

The principle on this subject is, that the acts of each partner to bind the firm, must be confined within the limits or scope of the partnership business.

If these are transcended, there must be an express or implied authority shown, or a subsequent ratification proved by the person claiming to hold the firm liable.



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Arthur Ferguson vs. Shephard & Gordon.

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These facts, like all others necessary to make out a case, may, of course, be established by the proof of circumstances. If other transactions of the kind had been approved of by the objecting partner; if he knew of this contract, and made no objection; indicated his approbation by words or actions; failed in a reasonable time to make known to the persons interested, that he would not be bound; these and the like facts, would be proper to go to a jury on the question of authority or assent to the act of one partner, not within the scope of the partnership by the other.

But here the jury were told that a simple failure on the part of Ferguson, to *give notice* to the plaintiffs in a reasonable time that the purchase of dry goods, and the execution of the notes, were without authority from him, and would not be ratified, would bind him upon the notes.

We are aware of no authority which will support this position; none to which we are referred go to that extent.

The judgment will be reversed, and the cause be remanded for a new trial.

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B. T. Johnson vs. J. Walton, trustee.

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B. T. JOHNSON vs. J. WALTON, trustee.

1. ANTE-NUPTIAL SETTLEMENT. *Registration. Act of 1831, ch. 90.* All marriage contracts or agreements in which the wife's property before marriage is settled on her or a trustee for her use, since the passage of the Act of 1831, ch. 90, must be proven and registered in strict conformity to the provisions of said act as to all matters of substance, or the same will be void as to the existing or subsequent creditors of the husband or purchasers from him without notice. So the omission of the clerk in his certificate of acknowledgment to insert the words "with whom I am personally acquainted," (they being a material part of the formula prescribed by said act to identify the parties,) is fatal to the probate of such instrument.
2. SAME. *Same.* An acknowledgment of a marriage contract, taken after the marriage, without the privy examination of the wife is a nullity, though the contract were executed before marriage.

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FROM SUMNER.

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This was an action of replevin in the circuit court of Sumner, brought by Walton as trustee for Francis George, to recover a slave conveyed to him by deed executed by said Frances while Frances King, and Hugh T. George in contemplation of marriage, in trust for the use and benefit of said Frances. The slave was levied upon some time after the marriage, by the plaintiff in error as an officer, under an execution against George. The marriage settlement it seems was executed by the parties before the marriage, and acknowledged and registered a few days thereafter. The recovery was resisted by the defendant in replevin, on the ground of certain irregularity in the probate and registration of the instrument, which are stated in the opinion. There was verdict and judgment in the court below, Judge BAXTER,

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B. T. Johnson vs. J. Walton, trustee.

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presiding, for the trustee Walton, from which Johnson appealed in error to this court.

GUILD, for the plaintiff in error.

SOLOMAN, for the defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of replevin. It appears from the bill of exceptions, that on the 27th of October, 1850, Frances King, then a *feme sole*, and the owner of several slaves and other personal property, in contemplation of marriage with Hugh T. George, made conveyance, (in which her intended husband joined) of said slaves and property to Josiah Walton, the plaintiff below, in trust for her separate use and benefit. The marriage took place on the same day, but subsequent to the execution of the deed of settlement, to-wit, 27th of October, 1850. The deed purports to have been acknowledged and registered in Sumner county, where the parties then resided. The supposed acknowledgment of the deed was made three days after its execution, and after the marriage. The certificate is as follows:

"*State of Tennessee, Sumner County*: Personally appeared before me, John L. Bugg, clerk of the county court of said county, Frances King and Hugh T. George, the bargainors, and who acknowledged that they made and executed the within marriage contract, and for the purposes therein set forth, witness my hand at office, this 30th October, 1850.

JOHN L. BUGG, *Clerk.*"

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B. T. Johnson *vs.* J. Walton, *trustee.*

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On the foregoing certificate of acknowledgment, the deed was admitted to registration, on the 4th of November, 1850. On the 5th of June, 1852, Benjamin S. Johnson, the plaintiff in error, recovered a judgment for \$61 16, before a justice of Sumner county, against said Hugh T. George, upon a promissory note executed by him and others, bearing date the 9th of August, 1851. Execution was issued on said judgment and levied on a boy named Henry, one of the slaves included in the foregoing deed of settlement, and thereupon this action was brought by Walton the trustee, and the slave was replevied. The jury found for the plaintiff, and a new trial having been refused, the defendant appealed in error to this court. On the trial, the before mentioned deed, though objected to, was admitted to go to the jury.

In this we think there was error. By the act of 1831, ch. 90, "all marriage contracts or agreements," are required to be acknowledged by the party or parties executing the same, or to be proved by at least two subscribing witnesses in the manner prescribed in that act; see § 1-3. And by the 5th section, marriage contracts or agreements, in which the wife's property, before marriage, is settled on her or a trustee for her use, are required to be registered in the county where the husband resides at the time of marriage; and should the husband move to any other county in the State, it shall be registered in said county; and by the 12th section, it is declared, that all marriage contracts, not so proved and registered, "shall be void as to existing or subsequent creditors of the husband or purchasers from him without notice."

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B. T. Johnson vs. J. Walton, *trustee*.

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The ante-nuptial settlement in the present case can have no effect, as against the husband's creditors, on the ground that the acknowledgment of the deed, not being in conformity with the requirements of the statute, must be treated as a nullity, and this for two reasons. 1. The certificate of acknowledgment wholly omits the words, "with whom I am personally acquainted," required by the formula prescribed in the statute, for the purpose of establishing the identity of the parties. And this omission is not remedied by either of the acts referred to. The act of 1846, ch. 7, 8, which is the only one having any bearing on the case, only cures the omission of "such word or words" as do not affect the substance of the probate as required to be stated in the certificate by the act of 1831. This omission being a matter of substance, is therefore fatal to the probate of the deed.

2. The acknowledgment was taken *after the marriage*, as if the female bargainor were still a *feme sole*. Such acknowledgment is a mere nullity. It can neither operate to give legal effect to the deed, as an acknowledgment by her, as a *feme sole* nor as a *feme covert*. It cannot have the former effect, because at the time it was made, she had not the legal capacity to do the act, her separate legal existence being suspended and merged by the marriage; nor can it have the latter effect, because all other objections aside, her privy examination was not taken.

The deed must, therefore, be regarded as an unregistered instrument, and as such by the express terms of the act of 1831, it is void as against the existing, as well as the subsequent creditors of the husband.

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John Reid, *adm'r*, vs. The Bank of Tennessee *et al.*

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The rule was otherwise under the construction given to the act of 1785, ch. 12, § 1, as held in the case of *Baldwin vs. Baldwin*, 2 Humph. R., 473, and other cases. But the law in this respect was changed by the act of 1831.

The judgment is erroneous, and will be reversed, and the case be remanded for a new trial.

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JOHN REID, *adm'r*, vs. THE BANK OF TENNESSEE *et al.*

**MECHANIC'S LIEN.** *Repairs upon mortgaged property, made after mortgage registered, on the credit of mortgagor.* A mortgagee is entitled to priority of payment over the lien of a mechanic for work done and materials furnished at the request and on the credit of the mortgagor, after notice of the existence of the prior lien; and the registry of the mortgage is sufficient notice thereof.

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FROM DAVIDSON.

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This was a bill filed in chancery at Nashville, by John Reid as administrator, with the will annexed of R. F. L'Hommedieu, deceased, against the creditors and heirs of said decedent, suggesting the insolvency of said estate, and praying to administer the assets *pro rata* among the creditors. It appears that the whole of said estate consisted in an interest in a large mill and dis-

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tillery establishment in the vicinity of Nashville and the personalty appurtenant thereto. The Bank of Tennessee held a mortgage upon this property for the payment of a debt of \$20,000 owing it by said decedent and his partners in the ownership of this establishment. This mortgage was duly registered in the register's office of the county of Davidson. Pending the existence of the mortgage, the mill and distillery were partially destroyed by fire, and John Huff, a party to this suit, repaired the same, furnishing the materials therefor at the request and on the credit of the mortgagors, without the knowledge of the mortgagee. Upon the filing of this bill, Huff filed his petition asserting his mechanic's lien, and asking priority over the mortgagee in payment. Chancellor BRIEN decreed in his favor, and the bank appealed.

JOHN REID, for the Bank of Tennessee.

Reid was appointed administrator of R. F. L'Hommedieu. He suggested the insolvency of the estate in the county court of Davidson, and then filed a bill in the chancery court against the heirs and creditors, suggesting the insolvency, and praying that the estate should be wound up under the directions of the latter court.

L'Hommedieu had no property in this State, (neither real nor personal,) in his individual capacity. The only property he owned in this State was his interest in the property owned by the firm of R. F. L'Hommedieu & Co. The only property owned by the firm of R. F. L'Hommedieu & Co., was a piece of ground adjacent to Nashville, upon which was erected a mill for

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manufacturing flour and distilling spirits, and some personal property connected with the mill, which was not worth more than a few hundred dollars. Under the order of the court the personal property was sold and did not pay the costs, and left the mill as the only property to be divided among the creditors. The bill which was filed by Reid in the chancery court, to wind up the estate, was filed 5th March, 1847.

On the 1st of April, 1846, (before Mr. L'Hommedieu's death,) the mill and ground upon which it was erected, were conveyed to Henry Thayer, *in trust*, to secure him against loss for having endorsed four bills of exchange, each for \$5,000, which were drawn by L'Hommedieu & Co., on R. F. L'Hommedieu, at Cincinnati, and which were discounted by the Bank of Tennessee. The bank being the holder and owner of these bills of exchange, had the right to come into a court of equity and have this property sold and subjected to the payment of its debt.

After this property had been so mortgaged to pay these bills the mill burnt down. They were subsequently rebuilt by L'Hommedieu & Co., without the knowledge or consent of the bank. Huff was employed by L'Hommedieu & Co. to do the brick work.

When Reid filed his bill in the chancery court, suggesting the insolvency of the estate, he made the Bank of Tennessee a party defendant. The bank answered and set up its claim and the mortgage or deed of trust to secure. The claim was allowed, and the property ordered to be sold, and the bank became the purchaser, bidding the amount of its debt. Huff filed his petition in the cause as one of the creditors, against



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John Reid, *adm'r*, vs. The Bank of Tennessee *et al.*

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the administrator and the Bank of Tennessee, alleging that he had a lien upon the mill and ground for work and materials done and furnished as a mechanic; that although the lien of the bank was prior in point of time to his, yet he had, by his work, enhanced the value of the property, and in equity and conscience, ought to be preferred.

The case was heard before Chancellor Cahal upon this point, and he was of opinion that the bank ought to be preferred, and so decreed. From this decree Huff appealed to this court, and the supreme court, at its December Term, reversed the cause upon the ground that all the parties who were interested had not been included in the bill, or for some other informality. The Court did not touch the question as to which of these parties, (the bank or Huff,) had the better lien on this property. After the cause was remanded, it was heard before Chancellor Brien upon this point, and he was of the opinion that Huff ought to be preferred. From his decree the bank has appealed, and the cause is again before this court to be decided on this point.

The question, and the only question now to be decided, is, which debt ought to be first paid out of the proceeds of the mill and ground upon which it is erected: that due to the bank of Tennessee or that due to John Huff? The property only sold for enough to pay the debt of the bank. If, therefore, the debt of the bank is to be preferred, Huff loses his debt. If Huff is to be preferred, then to the extent of his debt, the bank loses. The property was mortgaged to the bank before Huff struck a lick upon the building. Huff

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was employed, not by the bank, but by L'Hommedieu & Co. The mortgage was spread upon the records of the country, and the bank, so far from assenting to the work being done by Huff did not even know that he was employed. Huff, however, contends that he advanced the value of the property. How is this? I think the lien of the bank is to be preferred. 7 Yerg. R., 168. *Gillespie vs. Bradford et al.* 8 Smede's & Marshall's R., 451.

R. N. WILLIAMS, for Huff:

The question intended to be presented for decision upon this record is, whether or not Huff, by virtue of the mechanic's lien, given by our statutes, is entitled to pay for work done by him, as a mechanic, by contract with the equitable owner, in repairing, or rebuilding in part, a house situate upon a lot that had been previously conveyed by deed of trust to secure the payment of debts, equally with, or in preference to the beneficiaries in the deed. The case was before the court at the December Term, 1848, but went off on other points without touching this. There has been no difficulty or litigation as to the amount of the account. The only question is as to the manner of payment. The deed was made to Henry Thayer on the 1st April, 1846; soon after which time the mill and distillery were burnt. Thayer then had only the lot with the ruins left by the fire, as security for his endorsements, amounting to \$20,000.

There was no obligation on the part of R. F. L'Hommedieu & Co., to rebuild or repair the houses.

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Their own interest prompts them to do so, and they employ Huff to do it. The repairs are made, and greatly enhance the value of the lot, and to the same extent, of course, the security of Thayer, for the benefit of the bank.

All the parties claiming to be the creditors, trust in the first instance, to the personal responsibility of R. F. L'Hommedieu & Co., and expect their debts to be paid by them, and look to the lot and improvements upon it as security in the event of failure of the firm to pay promptly. Huff insists that the lien given him by statute, is of equal dignity with the lien of Thayer created by deed, at least so far as his labor had enhanced the value of the property. Thayer still has what his deed gave him, and is it not inequitable to give him Huff's labor in addition, for no new consideration on his part, to the exclusion of Huff?

The depositions of George W. Neely, J. M. Hughes, John L. Stewart and George W. Smith, mechanics, who saw the work done by Huff, prove that the property was enhanced in value the whole price of his work. The report of the clerk shows, from the evidence of witnesses, that the claim was for repairs. Huff asks nothing from the lot on which Thayer had a claim; but only a small part of the value which has been added to it by his brick and mortar. Much the larger portion of his debt has been paid by the estate of L'Hommedieu, and by the firm before his death. Has he so blended and confused his work with what was already there, as to be compelled, by the doctrine of confusion of goods, to lose what he has done? Clearly not, because the additional value which

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he has created is easily ascertained. The work was not done, it is true, by any contract with the trustee, but by contract with his agents in possession of the property, who are presumed to have acted by his consent, if not with his direct sanction, and by his authority.

It has been frequently held that persons were entitled to compensation for valuable improvements made upon lands under invalid contracts for their purchase, or under parol gifts, or declarations of intention to give, which were not afterwards carried into effect. In this class of cases compensation is made for improvements upon the ground that they benefit the land, increase its value; and it would be inequitable to allow the legal owner to receive this increased value, created upon his property at the expense of another, without objection on his part, or induced by his conduct, at the expense and to the injury of the innocent intended purchaser or donee. Does not Huff occupy a position equally favorable? Is he not as much entitled to compensation for the increased value he has created, as the intended donee or purchaser? The cases are analogous, and it is insisted that they rest upon the same principle.

MEIGS, for Huff.

The Bank of Tennessee discounted four bills of exchange, each for \$5,000, drawn on the 31st of March, 1846, by L'Hommedieu & Co., on R. F. L'Hommedieu, endorsed by Henry Thayer, payable in twelve, thirteen, fourteen and fifteen months after date. To

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secure the payment of these bills, L'Hommedieu & Co. executed a deed of trust upon their mill and distillery near Nashville, on the 1st of April, 1846. On the — day of —, 1846, the mill and distillery were burnt, and nothing remained to the bank to secure the repayment of these bills but the personal responsibility of L'Hommedieu, and the naked lot on which the establishment had stood.

On the 18th of May, 1846, L'Hommedieu & Co. contracted with John Huff, bricklayer, to rebuild the mill and distillery, which he did for the price of \$2,133 27 cents, all of which, except \$799 21 cents, was paid. For this balance he claims a lien upon the mill and distillery. And the question is: Whether the bank is entitled to priority over Huff? The Mechanic's lien is given by the act of 1825, ch. 37, where the building is erected "by special contract with the owner of the land."

The contract here, was made with the mortgagor, and the work done between the 8th of May and 26th of December, 1846, before either of the bills, to secure payment of which the bank held the deed of trust, became due. The deed of trust was not to be enforced till a bill became due, and was permitted to remain unpaid.

A mortgagor, while in possession, may exercise the rights of an owner, provided he does nothing to impair the security. 4 Kent's Com., 161, 3d ed. 2 Story's Eq., § 1017.

A mortgagor is not bound to repair buildings consumed by fire. *Campbell vs. McComb*, 4 Johns. Ch. R., 534-542.

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But if he does repair, in the exercise of the rights of owner, if these repairs do not impair but enhance the security, ought the mortgagee to receive the benefit unaffected by the legal lien of the mechanic? Ought not the rule to apply in such case, *qui sentit commodum, sentire debet et onus*? 2 Story's Eq., Ju. § 1234 -1241.

It cannot be said that the mechanic looks to the owner, with whom he contracts personally. The presumption is the other way: *i. e.*, that he looks to the security given him by law.

2. Almost the entire value of this property consists in the mill and distillery, the building of which enhanced the value of the land on which they are situated, to the entire amount of the cost of their construction.

This enhanced value is added to the land by the labor of the builder, and enures to the benefit of the two *cestuis que trust*, L'Hommedieu & Co., and the bank. They are to be regarded as tenants in common of the estate. But the legal estate, out of which their equity arises, is improved in value by the labor of the builder, acting under a contract with one of them; and now, shall they enjoy this enhanced value, the one by paying, the other by receiving so much more of the debt, without mutually paying for the builder's labor; the one by paying and the other by receiving less of the debt.

3. If a manufactory is put into the hands of a trustee, for the mutual benefit of two persons, are the laborers employed in it not entitled to pay for their labor before any dividend is made of the profits?

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4. Owners are bound *pro bono publico*, to maintain houses and mills, which are for habitation and use of men. Coke upon Lit., 200, b. And, therefore, if there be two tenants in common, or joint tenants of a house or mill, and it fell into decay, and the one is willing to repair, and the other will not, he that is willing shall have a writ *de reparatione facienda*. *Id.*

If two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs and improvements, and dies, this shall be a lien on the land, and a trust for the representatives of him who advanced it. *Lake vs. Gibson*, 1 Eq. Ca. Ab., 291, cited Fonblq, book 2, ch. 4, § 2, note g. 3 Paige, 545, cited 4 Bouvier's Insts., § 3961-1.

A mortgagee in possession, has a right to erect new buildings on the site of the old, and for the same purposes as were served by them. For, in such case, the new buildings are merely substitutions for those which were too ruinous to be any longer useful. And on ascertaining what is due on the mortgage, the mortgagee will be allowed the costs of such repairs or improvements. 3 Powell, Mort. 957, a, note 2. 2 Spence Eq., 648. And it must follow, that if a mechanic had made such improvements or repairs, the mortgagor would not be allowed to redeem without paying his bills.

Now, the mortgagor is the real owner of the property in equity, and if in possession he not only has a right but it is his duty to keep the *corpus* of the property from becoming a less adequate security for the debt than it was when the incumbrance was created.

If the property was a mill or habitation, the common law, it seems, made it the duty of the owner to

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keep the mill or habitation in a useful state, merely *pro bono publico*; that is, where no particular person, but only the public at large, had an interest in the estate. Can it be less the owner's duty then, to repair a mill or dwelling in which another has acquired a right?

But if it is his duty to repair, and he employs a mechanic to furnish materials and do the work, shall the incumbrancer, to whom the duty was owing, and for whose security the work was done and the materials provided, take the property discharged of the lien, to which it would have been subject if the incumbrance had not existed?

And what the mortgagor was bound to do for the public good, and in conscience for the benefit of the mortgagee, shall not be done at the expense of the innocent laborer, who was employed by an owner and possessor, thus bound; and moreover, vested with the right, on his own account, to maintain the integrity of his property.

Such being the right and duty of the mortgagor, he is such an "owner" of the ground as can make a contract with the mechanic for repairs and improvements, in virtue of which the lien is given by our acts of assembly. Meigs' Dig., § 1258. And this he can do without consulting the mortgagee; for, as the mortgagee would have no right or power to forbid the work, there can be no purpose in giving him notice.

In short, it is equally unreasonable to imagine that he would be disposed to forbid it, and to hold that he can have a right to the labor without compensating the laborer.



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TORTEN, J., delivered the opinion of the court.

The plaintiff, as administrator, with the will annexed of said L'Hommedieu, deceased, filed a bill in chancery to administer the assets of his intestate to the creditors *pro rata*, under the insolvent law. The Bank of Tennessee was a creditor of said intestate for \$20,000; to secure the payment of which it held a mortgage on a lot of land on which was erected a flour mill and distillery near Nashville. The mortgage was executed by said intestate and others. The bank set up its lien, and the land was sold to the bank for \$20,000, and the same was credited on its debt. The defendant, Huff, filed his petition in said suit, claiming to be a creditor of said intestate for \$799.21, for brick work done by him as a mechanic, on said lot of land. It appears that after said mortgage was executed and registered, the buildings on said land were destroyed by fire; and said intestate and those interested with him, employed said Huff to do brick work in rebuilding and repairing the same. The demand of said Huff is for a balance due on that account, and he claims that he has a priority over the mortgagee for work done as a mechanic, on the premises.

The mechanic has a lien by statute for one year, upon any lot or tract of land for work done or materials furnished at the instance of the "owner," in building or repairing any house or fixture thereon. Meigs' Dig., § 1258.

Now, the mortgagor, it is true, is the real owner of the land in equity, and if he employ mechanics to make improvements upon it they acquire a lien thereon

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for payment. For the mortgagee is considered as a creditor, not owner; and the only interest he has in the land, consists in a lien or security for the payment of his debt. It is a mere chattel interest. The mortgagor may exercise the rights of owner, if he do not commit waste or otherwise impair the security. *Brady vs. Waldran*, 2 John. Ch. R., 148. But, "in ordinary cases he is not bound to repair and keep the estate in good order; and there is no instance in which a court of equity has undertaken to correct permissive waste, or to compel the mortgagor to repair." 4 Kent's Com., 162. *Campbell vs. McComb*, 4 Johns. Ch. Rep., 534. It is true, that one of two joint tenants, or tenants in common, may make proper and reasonable repairs of houses or mills, on an estate in which they have a community of interest, and be entitled to contribution from the other, because they are equally owners of the estate, entitled to its use and enjoyment; and because, as Lord Coke says, owners are bound *pro bono publico*, to maintain houses and mills, which are for habitation and use of men. Co. Litt., 200, b. 4 Kent, 370. But this rule applies to the case of joint owners, and can have no application to the case before us; for the mortgagee is not owner in the sense of the rule.

The mortgagor was under no obligations to the mortgagee to repair the buildings destroyed by fire. It was at his discretion to repair them or not in view of his own interest. Nor was the mortgagee bound to concur in making the repairs, or liable in any sense, for the expense, without his consent.

The case then results in this: That the repairs were made at the request of the mortgagor, and upon

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his credit. The mechanic was also entitled to a lien on the mortgagor's interest in the land as a security for payment. But as there was a prior lien of which the mechanic had notice, and as the interest of the mortgagor is subject to that lien, the mechanic could acquire no greater or higher interest by his contract with the mortgagor than that which the mortgagor possessed. The mechanic knew, or might have known of the existence of the prior lien, and has no cause to complain that it is entitled to a priority of payment. Under a different rule, it would be in the power of the mortgagor to destroy the security by erecting costly improvements, the expense of which, the estate improved would not be able to pay.

We are of opinion that the mortgagee is entitled to priority of payment over the lien of the mechanic for work done and materials furnished, after notice of the existence of the prior lien. The registry of the mortgage is such notice.

The Chancellor held a different opinion; his decree will therefore be reversed.

Decree reversed.

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S. L. Tyree vs. P. G. Magness.

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S. L. TYREE vs. P. G. MAGNESS.

1. **LOST INSTRUMENT.** *Secondary evidence as to contents of.* Secondary evidence as to the contents of a lost note, in a suit to recover the amount, cannot be heard until its non-production is accounted for by the person last having the legal custody thereof. It is the province of the Judge, not the jury, to determine from the proof whether there is a reasonable presumption that the paper has been lost.
2. **SAME.** *Affidavit of the plaintiff.* The affidavit of the plaintiff as to the loss of a paper upon which he has instituted a suit, must be given before the court or justice before whom the suit is instituted, at the time of obtaining the warrant or filing the declaration, as the case may be. An affidavit sworn to before a justice having nothing to do with the suit, will not suffice.
3. **RES JUDICATA.** Where suit is brought by an assignee of a note against the makers, who recover judgment against the assignee on the *merits*, upon a cause of defence that existed against the note before the assignment, and the assignor was notified of the defense so as to enable him to litigate the matter with the defendants, the assignor cannot afterwards, by erasing the assignment, maintain a suit against the same parties on the note. In such case the assignee succeeded to the interest of the assignor, and held in privity with him.

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FROM DE KALB.

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This case originated before a justice of the peace in DeKalb county, and was brought by appeal into the circuit court, where it was submitted to a jury before Judge GOODALL, upon the facts and under the instructions stated in the opinion. There was a verdict and judgment for the plaintiff, from which the defendant appealed in error to this court.

JORDAN STOKES and M. M. BRIEN, for the plaintiff in error.

CANTRELL and COLMS, for the defendant in error.

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S. L. Tyree vs. P. G. Magness.

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TOTTEN, J., delivered the opinion of the court.

This suit was instituted by Magness against Tyree, before a justice of DeKalb. There was judgment for the plaintiff, and defendant appealed to the circuit court, where, in a trial *de novo*, there was again judgment for the plaintiff, and defendant appealed in error to this court.

1. The action is founded on a note executed by Youngblood and Tyree to one Wm. Donn, and by him assigned to plaintiff. The note was present at the trial before the justice, but not at the trial before the circuit court, and secondary evidence of its contents was admitted, to which the defendant excepted.

Cantrell, a witness, stated that he had made diligent search in the clerk's office, and was unable to find the note; the plaintiff then presented his affidavit, stating the loss of the note, and that it had not been assigned. This affidavit was not sworn to before the court, but before a justice, where the cause was not pending.

This is a preliminary question in the trial of a cause, and it is the province of the Judge, not the jury, to determine from the proof, whether there is a reasonable presumption that the paper has been lost. In the present case, the proof did not warrant the presumption, and secondary evidence was therefore inadmissible. If there be no ground of suspicion that the paper is suppressed, ordinary diligence to produce it will be deemed sufficient, and what is proper diligence must depend much upon the circumstances of the case. 4 Phil. Ev., C. & H. notes, 441.

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We are to presume that this note was deposited with the clerk, with the other papers in the suit; for that was the official duty of the justice. A search by the clerk among his official papers, which proves to be fruitless, is *prima facie* sufficient diligence. But it must appear that the clerk or person having the legal custody of the papers, had made the search and been called upon to account for the lost paper. This does not appear in the present case.

It was also material that the plaintiff make affidavit to the fact of the loss. The affidavit produced was no compliance with this rule; for being made before a justice, where the suit was not pending, it was merely voluntary, and had no legal connection with the suit.

2. Before the present suit, this note had been assigned by said Magness to one Cantrell, who sued the makers, and judgment was rendered against him. He then erased the assignment and returned the note to Magness, who, claiming to be remitted to his original rights, instituted thereon the present suit. This matter was relied upon as a defense in bar, but the court overruled the defense, and instructed the jury that it was no bar to the present suit. If the former judgment was a decision upon the merits, upon a cause of defense that existed against the note before the assignment, and the assignor was notified of such defense, so as to enable him to litigate the matter with the defendant, we should consider it a bar to the present suit, otherwise not; for the assignee succeeded to the interest of the assignor, and held in privity with him. The instruction given to the jury in this respect was therefore erroneous.

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The judgment will be reversed and the cause be remanded.

Judgment reversed.

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HUBBARD AND WOOD vs. T. WOOD'S *Lessee*.

- 1 ASSURANCE OF TITLE. *Act of 1819, ch. 28.* A title by descent, is an assurance of title within the meaning of the act of 1819, ch. 28.
2. TITLE. *Modes of acquiring.* All the modes of acquiring title to real property, known to our law, are reducible to two, viz : *descent*, where the title is vested in the heir by operation of law, and *purchase*, which in contradistinction to descent, includes all other methods of acquiring title to land.
3. TENANTS IN COMMON. *As affected by statute of limitations. Adverse possession of co-tenant.* An actual ouster must be clearly established, in order to give effect to the statute of limitations in favor of one tenant in common against another, as nothing but an actual ouster or what is held its equivalent, can give a tenant in common an exclusive possession.
4. SAME. *Same.* The presumption is against an adverse possession between privies. Therefore the possession of one tenant in common, being consistent with the right of the other, and in support of their common title, the statute of limitations must be strictly construed in favor of the co-tenant not in actual possession.
5. SAME. *Evidence of disseisin.* An exclusive adverse possession by one tenant in common of the whole tract of land, or the exclusive receipt of the rents and profits ; no demand being made by the other tenant during the period prescribed in the statute of limitations, or if such demand be made it is refused and the title denied, may be evidence of a disseisin or actual ouster.

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FROM RUTHERFORD.

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This action of ejectment was brought by the defendant in error, against the plaintiffs in error, in the cir-

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cuit court of Rutherford, on the 18th day of April, 1850, to recover one-half of a tract of land in said county, claimed by them as tenants in common with the plaintiff in error, Robert Wood, by descent from Thomas Wood, deceased. It appears that Thomas Wood died intestate, in Rutherford county, in the month of June, 1830, the owner of the land in controversy. He had five children, three of whom survived him, the other two leaving children. Robert Wood, one of the defendants in ejectment, and one of the children of Thomas Wood, took possession of the land upon the death of his father, and remained in possession until this suit was brought. The land was levied upon and sold as the property of Robert Wood, and the other defendant in ejectment, John Hubbard, became the purchaser at said Sheriff's sale on the 3d of June, 1843. The purchaser, Hubbard, received the sheriff's deed, and Robert Wood continued in possession from the date of said sale, as the tenant of Hubbard, accounting to him for rents, until the 8th of April, 1850. It seems that Edmund Wood, the brother of Robert, and father of some of the lessors of the plaintiff, lived for many years in the vicinity of Robert after the latter took possession of the land, and never asserted any claim or interest in the same; and said Edmund was also present at the sheriff's sale, when the entire tract was sold as the property of Robert, but made no objection to said sale. Robert Wood it seems, had always claimed one-half the land by descent and purchase together, since the death of his father. Hubbard the purchaser, and Robert Wood his tenant, were jointly sued and jointly defended. There was verdict and judgment in the court below, Judge DAVIDSON, presiding, for



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the plaintiff's in ejectment for one-half the land, from which defendants appealed in error to this court.

E. A. KEEBLE, for the plaintiff in error.

The errors assigned are :

1. The court excluded from the consideration of the jury the question, whether or not Robert Wood, commenced his holding of the land in controversy, previous to the death of his father. The court assumed that he did not.

2. The court erred in defining to the jury, the effect of one tenant in common holding adversely, under the first section of the statute of 1819. It is insisted, that such holding would operate to vest the legal title to the whole tract. The title cast upon him as one of the heirs, by descent, is an *assurance of title* to the whole tract of land. *Story, et als. vs. Saunders and wife*, 8 Humph., 667.

3. After defining adverse possession, the court limits the effect of it to the second section only.

4. The Court erred in stating that after the sale by the sheriff, Robert Wood's possession would not protect him against the suit of the plaintiffs.

The words of the second section, are, that no person or their heirs shall have, sue, or maintain any action or suit, &c., but within seven years next after the title or cause of action has accrued. Statute of 1819, ch. 28 § 2.

5. The whole of the last clause is erroneous.

As to the effect of the statute of limitations, upon the title or right of action of Edmund Wood and his heirs; and as to the estoppel the proof is absolutely

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conclusive, and for that reason alone the judgment should be reversed.

J. W. BURTON and JAS. M. AVANT, for the defendants in error.

The only questions in the cause, arise upon the charge of the court, as to the transfer, and coupling the possession, contemplated by the second section of our act of 1819; and as to the doctrine of estoppel.

1. The possession of a wrong doer cannot be transferred so as to couple the two possessions, and form the bar or protection provided by the second section of the act of 1819. See 1st Swan, 385.

Unless the defendant could show that Robert Wood held adversely, there would be nothing upon which this question could be raised; it will not be denied, that the possession of one tenant in common is the possession of his co-tenant. His possession then, if not adverse, was the possession of the other since the death of his father. The proof is full upon this point. We think it most conclusively shows that Robert Wood did not hold possession at any time, adverse to the lessor's of the plaintiffs. The court will see that there is ample proof upon this point; its weight and conflict is properly left to the jury.

2. The charge of the court as to the question of estoppel, is in the words used by this court in the case of *Morris vs. Moore & Hancock*, 11 Humph., 433. The court is referred also to the case of *Washington vs. Conrad*, 2 Humph., 562. And to 3 Johnson, case 101. 8 Wendel, 483. 10 Barbour's R., 432. They decide that,

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"admissions and conduct are said to operate as estoppels only when they are designed to influence the conduct of others, and actually have that effect.

The testimony relied upon to sustain this point, the court will see is this. Edmund Wood, the father of a part of the plaintiffs, lived in Rutherford county up to his death, received perhaps no rents for any portion of the land, and was at the sheriff's sale of the land, and did not forbid the sale or say anything about it.

The testimony of a part of the witnesses, is stated by agreement. It is stated in the bill of exceptions, that Robert Wood held possession under Hubbard, and as his tenant after the sheriff's sale.

The charge of the court appears upon all the questions he was requested to charge upon, and only so much of the charge as was necessary to bring the points made below before this court, is embraced in the bill of exceptions. The court was not asked to charge further; nor was it desired that more of the charge should appear.

THEO. G. JONES, for the defendants in error.

A person not in possession at the time of an execution sale, is not estopped from disputing title of purchaser. *Kimbrough vs. Benton*, et al., 3 Humph., 110, 117. As to acquiescence in sale, see *Morris vs. Hancock*, 11 Humph., 433.

Possession of wrong doers no privity. See *Moffitt vs. McDonald*, 11 Humph.

The case of *Ohilton vs. Morris*, 9 Humph., as to continuity of possession to complete the bar, does not apply to this case.

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Hubbard and Wood *vs.* T. Wood's *lessors*.

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McKINNEY, J., delivered the opinion of the court.

This was an action of ejectment. The plaintiff's recovered, by the judgment of the court, an undivided moiety of the land sued for, to reverse which judgment, an appeal in error has been prosecuted to this court.

The tract of land described in the declaration, descended to the lessors of the plaintiffs, and the defendant Robert Wood, jointly, as the heirs at law of Thomas Wood, who died intestate in June, 1830. Upon the death of the intestate, the defendant, Robert Wood, was left in the sole and exclusive *actual* possession of said tract of land, and this possession was continued until the year 1843, when the entire tract was levied upon and sold at execution sale, as the property of Robert Wood, and was purchased by the other defendant Hubbard, after which Wood became the tenant of the purchaser, and in that character has remained ever since.

This action was commenced on the 18th of April, 1850, against Hubbard and Wood jointly, and they jointly defended the same. The period of time which elapsed before the commencement of this action, from the death of Thomas Wood, falls short some two months of twenty years; and from the date of the sheriff's sale is not quite seven years, the sale having been made on the third of June, 1843.

There is some discrepancy in the evidence as to the question, whether or not the possession of Robert Wood, prior to the Sheriff's sale, was adverse to his co-tenants. But if the charge of the court were free from exceptions, there is no sufficient ground for disturbing the

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verdict upon the facts of the case as presented in this record.

The defense relied upon was the statute of limitations. In his instructions to the jury, his Honor stated the law to be, that the effect of an adverse holding for the period of seven years by the defendant Wood against his co-tenants, "would be to perfect his title under the first section of the act of limitations of 1819, to his own share in all the land, and to protect his possession of the balance of the land against the plaintiff, under the second section of the act."

It seems to us that this is a mistaken conclusion. We take it to be too clear to admit of any discussion that a title by *descent* is an "assurance" of title within the meaning of the act of 1819.

All the modes of acquiring title to real property known to the law, are reducible to two: *descent*, where the title is vested in the heirs by operation of law, and *purchase*, which in contradistinction to descent, includes all other methods of acquiring title to land. 2 Blk. Com., 201.

Tenants in common, like joint tenants, have an unity of possession at least. The seisin and possession of each tenant in common is a seisin and possession, as well of every part as of the whole tract. And the title of each tenant, is a title extending to the whole tract. It must necessarily follow therefore—both the title and possession being entire—that the statute of limitations, if it be applicable at all in the present case, would operate to vest the defendant with an absolute indefeasible title to the whole tract, by virtue of the first section of the act of 1819.

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But to give effect to the statute of limitations, in favor of one tenant in common against another, an actual ouster must be clearly established. Nothing but an actual ouster, or what is held to be equivalent, can give a tenant in common an exclusive possession. The seisin and possession of one being the seisin and possession of the other; one can never be disseised by another, without actual ouster. And the possession of one being consistent with the right of the other, and in support of their common title, the statute of limitations is to receive a strict construction in favor of the co-tenant not in actual possession, as the presumption is against an adverse possession between privies. 2 Bos. & Pul. 542. 5 Burr., 2604.

But an exclusive adverse possession of the whole tract of land or the exclusive receipt of the rents and profits, no demand being made by the other tenant, or if made, refused, and his title denied, may be evidence of a disseisin or actual ouster. And in England in such a case, after the expiration of the period requisite to form the bar of the statute, the jury would be directed to presume an actual ouster, and the right of the co-tenant would be held to be barred by the statute of limitations. Cowper's R., 217. See Angel on Lim., ch. 32.

Other positions assumed in the charge, which we deem erroneous, are dependent upon, and result from the mistaken view of the court upon the point before stated, and therefore need not be noticed.

Let the judgment be reversed, and the case be remanded for a new trial.

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John P. Hoover vs. John W. Rawlings.

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## JOHN P. HOOVER vs. JOHN W. RAWLINGS.

1. DEPOSITIONS. *Act of 1852, ch. 161. Commission abolished by.* The act of 1852, ch. 161, authorizing either party litigant in any of the courts of this State to take depositions upon giving legal notice to the opposing party in all cases in which they may by law be taken, without an order from court or affidavit before, and order of the clerk as before the passage thereof, abolishes the commission for that purpose, and renders it unnecessary. [McKINNEY, J., dissented.]
2. PRACTICE. *As to depositions.* It is a settled rule of practice in the courts of Tennessee, that any judicial functionary competent to administer an oath in other States, is legally competent to take depositions, and that his statement in the caption or certificate that he sustains such office or character, is evidence *prima facie* of that fact.

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FROM BEDFORD.

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This was an action of ejectment in the circuit court of Bedford, in which Hoover, the defendant in ejectment, offered to read in evidence a deposition material to his defense, taken in 1852, before a justice of the peace in the State of Missouri, in which the commission issued from said circuit court, had been left blank as to the name of the commissioner. The plaintiff objected to the reading of the deposition, and Judge DAVIDSON excluded it. There was verdict and judgment for the plaintiff, from which defendant appealed in error to this court.

E. H. EWING, WISENER and TILLMAN, for the plaintiff in error.

E. A. KEEBLE and ED. COOPER, for the defendant in error.

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John P. Hoover *vs.* John W. Rawlings.

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TOTTEN, J., delivered the opinion of the court.

Ejectment. Rawlings sued Hoover in the circuit court of Bedford for a parcel of land, and the issue was upon a question of boundary, as appears in the verdict of the jury. The deposition of Joseph Allison, which is pertinent and material to the matter in issue, was offered in evidence by Hoover, the defendant. It appears on its face to be taken in Dade county, Missouri, March 3d, 1853, before Columbus Talbutt, justice of the peace in said county, and in virtue of a commission issued from the circuit court of Bedford. But the commission was in blank when issued, and so remained as to the name of the commissioner, when returned with the deposition to the circuit court. For this cause the deposition was rejected. There was judgment for the plaintiff, and defendant appealed in error.

The question now is, whether a commission was necessary; for it is clear that the present commission being in blank, is to be considered merely void.

The act of 1852, ch. 161, provides that, "hereafter it shall not be necessary to procure an order of court, or to make any affidavit before the clerk, or to get any order from the clerk, previous to taking a deposition, but that either party litigant in any of the courts of this State, shall take depositions upon giving legal notice to the opposing party, in all cases that by law they can be taken." We are of opinion that this act abolishes the commission and renders it unnecessary.

The last clause contains the express provision, complete in itself, "that either party shall take depositions



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upon giving legal notice to the opposing party." The preceding part of the statute having dispensed with the order, and the order being in legal effect simply this, that a commission shall issue, there can be no doubt of the intention to dispense with the commission also. When it dispenses with the order that directs a commission to issue it dispenses with the commission, which could not legally issue without such order, the one being dependent upon the other.

It does not provide that a commission shall issue without an order; and the order, without which it could not issue, being now abolished, is there any law by which the commission can issue?

We may further observe, that, under the act of 1794, ch. 1, § 30, the issuance of a commission was a formal act of the court, appointing some suitable person to take the deposition, but in effect, and for any useful purpose, it was abolished by the act of 1846, ch. 209, which provides that it might issue in blank, and the name of the commissioner be inserted by the party interested in its execution.

Under this act, the party, not the court, chooses and appoints, the commissioner having a blank process, and the authority of the law for that purpose. It then became a mere form, which might perplex the one party in its observance, and could be of no use to the other.

It is objected that the official character of the justice, before whom the deposition was taken, does not appear.

We consider it a settled rule of practice in our courts, that a justice of the peace, a judge, or other judicial

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functionary competent to administer an oath, in other States, is legally competent to take depositions; and that his statement in the caption or certificate that he sustains such office or character, is evidence *prima facie* of that fact. *Wilson vs. Smith*, 5 Yerg. R., 379.

Let the judgment be reversed, and the cause be remanded.

Judgment reversed.

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McKINNEY, J., concurred in reversing the judgment on the ground of surprise in the rejection of the deposition; but dissented upon the point that a commission was dispensed with by the act of 1852.

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#### HIRAM EDDE vs. WM. G. COWAN.

1. CERTIORARI AND SUPERSEDEAS. *Motion to dismiss. The court may look to the whole record brought up by certiorari.* The whole proceedings of the magistrate, as presented in a case properly brought up by certiorari should be taken into view by the court upon a motion to dismiss. They may be regarded as part of the petition, and are not extrinsic matter in contemplation of law.
2. SAME. *Same.* The question for the determination of the court on a motion to dismiss a *certiorari*, is: are the facts stated in the petition negatived by the papers brought up by the *certiorari*, or do they, when taken together, remove the grounds upon which the case made in the petition rests? If so, the motion should be sustained. *Vide 8 Humph., 703.*

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3. **EXECUTION.** *Scire facias to set aside satisfaction.* Act of 1847, ch. 191. The meaning and intention of the legislature by the act of 1847, ch. 191, authorising the creditor whose execution has been levied upon property as the property of the debtor, and satisfied by the sale thereof, in the event said property or the value thereof is afterwards recovered by some third person claiming the same, to have said satisfaction set aside and the judgment revived, was to embrace all cases where it turned out that the creditor gets nothing by the sale, on account of the failure of the debtor's title to the property sold, whether the same be real or personal.
4. **CERTIORARI AND SUPERSEDEAS.** *Petitioner's surety. His liability.* Where the petition only complains of the execution which it seeks to supersede, grounded on some matter of discharge subsequent to judgment, and makes no objection to the judgment itself, such proceeding is in the nature of an *audita querela*, and the security is not liable for the debt, but only for the costs. *Vide* 10 *Yerg.*, 252.

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FROM BEDFORD.

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The plaintiff was defendant in certain executions issued by a justice of the peace in favor of Cowan the defendant, which were levied upon a tract of land as the property of the plaintiff, which was condemned and sold, Cowan becoming the purchaser at the full amount of his debt. The executions were returned satisfied, and Cowan proceeded by his action of ejectment to recover the land so purchased from one Pratt, the tenant in possession. This action resulted in a verdict and judgment against Cowan for want of title in Edde at the time of the sale. Cowan thereupon by a proceeding regular in form, under the act of 1847, ch. 191, had the satisfaction of his execution set aside and took out another which was levied upon Edde's property. Edde petitioned for and obtained writs of *certiorari* and *supersedeas*, and brought the matter before the circuit court of Bedford. The petition alleged the prior satisfaction of the execution as the *only ground* of the application, and was silent

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as to the other facts before stated. The court, Judge DAVIDSON presiding, upon motion to dismiss, looked to the whole proceedings before the magistrate as brought up by the *certiorari*, and sustained the motion to dismiss, giving judgment against petitioner and his security for the whole debt and costs. The petitioner appealed in error to this court.

WILLIAM H. WISENER, for the plaintiff in error.

ED. COOPER, for the defendant.

CARUTHERS, J., delivered the opinion of the court.

This is an appeal in error from the judgment of his Honor, the Circuit Judge, dismissing the petition of the plaintiff for writs of *certiorari* and *supersedeas* in the circuit court of Bedford county.

The petitioner states that on the 24th May, 1851, the defendant Cowan recovered two judgments against him, one for \$60.00, and the other for \$95.00, before John W. Hamlin, Esq., upon which executions were issued in October, 1851, and were levied upon a tract of land as his property, which was condemned in the circuit court, and sold under a writ of *venditioni exponas* to the defendant for the full amount of his two judgments and costs, and the said writs returned satisfied. It further charges that notwithstanding said satisfaction, alias executions were issued upon the same judgments on the 29th of June, 1853, and levied upon his property. The prayer of the petition was granted, and writs of *certiorari* and *supersedeas* issued, upon bond

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and security having been given by express directions in the fiat, "as required by the Act of 1807, ch. 81., § 1."

The magistrate having possession of the papers, in obedience to the command of the writ of certiorari, sent them all up to the circuit court. By these it appeared, in addition to the facts stated in the petition, that after the said Cowan had purchased the said land, he instituted an action of ejectment in the circuit court of Bedford county, upon the title thus acquired against one Silas Pratt, and failed to recover it, on the ground that the title was not in the said Edde at the time of the sale, and therefore he acquired nothing by his purchase, whereupon by *scire facias* he obtained a revival of his original judgments on the 10th of June, 1853, in pursuance of the Act of 1847-8, ch. 191. After this proceeding on the 29th of June, 1853, the executions superseded in this case were issued. The petition makes no reference to these latter proceedings, but stops at the sale of the land, and the satisfaction then entered. This makes a clear case upon the face of the petition, for superseding and quashing the last executions, on the ground that the judgments were fully paid off by the sale of the land. The first question made here is, whether upon a motion to dismiss, the judgment of revivor upon setting aside the satisfaction, can be looked to and considered? It is insisted that the court, upon this motion, must act upon the facts alone which are stated on the face of the petition. To sustain this position, reference is made to the case of *Studdart vs. Fowlkes*, decided by this court at last term, and reported in 2 Swan, 537. The question in that case was as to the admissibility

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of counter affidavits upon a motion to dismiss. It was decided this could not be done, but that the action of the court must be predicated upon the face of the petition and not extrinsic evidence; that upon this preliminary motion the court should not be involved in the trial of facts on the various issues that might be made by affidavits and counter affidavits. But it is not intimated in that case, as it certainly was not so intended, that the whole proceedings of the magistrate, as presented in the case properly brought up by the certiorari, should not be taken into view on the motion to dismiss. These may be regarded as a part of the petition; they constitute the case complained of and brought before the court for inspection on the application to quash the executions. It will be seen in that case, a contrary practice established in several cases in our earlier decisions, reported by Judge Overton in his two volumes of Tennessee Reports, is changed, and these cases overruled. The evils pointed out in the opinion of this court, and the point then in judgment, were confined to the introduction of counter affidavits.

It is true the principle of the decision extends to all extrinsic evidence. This was of course only intended to apply to matters outside of the case, and not to facts contained in the recorded proceedings of the magistrate in the case brought up by the certiorari, issued in obedience to the fiat on the prayer of the petitioner; but no matter extraneous to the petition and the record brought up, can be looked to on a motion to dismiss. Here the petitioner states just enough of the proceedings below to obtain his writs, and answer his purpose, but omits to set forth other steps in the case, which

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would show his application to be groundless, and then insists that no more of the record can be noticed than he has seen fit to refer to in his petition. Such a practice would be productive of delays and injustice, and cannot be tolerated.

The question made in this case has to be tried at last by the papers. The official returns of the collecting officers must be examined to see if the judgment has been satisfied as alleged. When this inspection is made, it is found by the court, that although that is true, yet it further appears that the said satisfaction has been set aside and the judgment revived according to law, so that the execution superseded was issued upon a valid unsatisfied judgment, and cannot therefore be quashed. The only course then that can be taken by this court, is to dismiss the petition and discharge the supersedeas. If the motion were overruled and the case delayed, the matter would still have to be tried by the records and the same result produced.

The only question in this kind of case is: are the facts stated in the opinion negatived by the papers brought up by the certiorari? or rather, do these, when taken together, remove the grounds upon which the case made in the petition rests? If so, the motion to dismiss should be sustained. *Spivy vs. Latham*, 8 Hump., 704. But it is contended that the act of 1847, ch. 151, does not authorise a revival of a judgment in a case like the present, but only applies to cases of satisfaction produced by the sale of personal estate, which is afterwards recovered from the purchaser. We have no doubt but that it was the meaning and intention of the Legislature to allow the satisfaction to be set aside,

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and the judgment revived wherever it turned out that the creditor got nothing by the sale on account of the failure of the title of the debtor to the property sold, whether real or personal.

The court below, however, erred in entering judgment against the security of the petitioner for the amount of the executions which were superseded; he was only liable for the cost of the new proceeding. The law was thus settled in the case of *Kincaid vs. Morris*, 10 Yerg., 252, upon the ground that where the objection made in the petition is only to the execution which it seeks to supersede, grounded on some matter of discharge after judgment, without any complaint as to the judgment, the proceeding is in the nature of an *audita querela*, and is not embraced in the act of 1807, ch. 81, § 1, or that of 1817, ch. 119, by which the sureties are made liable for the debt as well as the cost. These acts only provide for cases brought up for re-investigation of the correctness of the judgment, as upon appeal.

For this error the judgment will be reversed, the petition dismissed, with judgment against the petitioner and his surety below for costs of the circuit court and a *procedendo* awarded.



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Susan Wooldridge *et al.* vs. The Planter's Bank *et al.*

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SUSAN WOOLDRIDGE *et al.* vs. THE PLANTER'S BANK *et al.*

1. TRUSTEE. *Where one resigns and another appointed by the court without vestiture of title.* Act of 1831, ch. 107. Where a trustee tenders his resignation to the chancery court, under the act of 1831, ch. 107, which is accepted and another appointed in his stead, without a formal vestiture of title in the trust fund; upon the discharge of the first trustee, by implication of law, the title is transferred to and becomes vested in his successor, appointed by the court.
2. LIMITATION. *Statute of, as applied to trust estates.* When the statute of limitations begins to run, its operation cannot be arrested or suspended otherwise than by a suit in law or equity successfully prosecuted. So the death of a trustee, in whom alone is the right to sue, after the statute of limitations has commenced to run against him, and before the purposes of the trust are accomplished, and the failure to have a successor appointed before the lapse of time prescribed in the statute, can have no effect in preventing the bar of the statute.
3. SAME. *Same. Cestui que trust.* It is well settled, that if a trustee having the legal title, is barred by the statute of limitations, the *cestui que trust* is also barred though an infant. *Vide 8 Humph., 563.*

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FROM GILES.

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This was a bill filed in chancery at Pulaski, upon the facts and for the purposes fully given in the opinion. Chancellor BRIEN gave a decree in favor of complainants, from which defendants appealed to this court.

M. S. FRIERSON, ELDRIDGE and LESTER, for the complainants.

WALKER and BROWN, for respondents.

McKINNEY, J., delivered the opinion of the court.

The complainants are the widow and minor children of John P. Wooldridge, deceased.

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It appears from the pleadings and proof in the cause, that on the 23d of January, 1836, said John P. Wooldridge purchased from one John K. Yerger, a lot of ground with the improvements thereon, situated in the town of Pulaski, being lot, No. 30, in the plan of said town, at the price of \$1500; and took from said Yerger a bond for the title upon payment of the purchase money. Wooldridge entered into possession of said property, in pursuance of his purchase. On the 8th of March, 1839, Wooldridge, without having received a conveyance of the legal title from Yerger, made a deed of trust including said lot, and other property, real and personal, to John C. Walker, in trust, to secure the payment of certain debts; and after their discharge, to hold the balance of the property conveyed in further trust, to apply the annual rents, profits and hire thereof to the support of the complainant Susan, and also to the maintenance and education of the other complainants, his three children, until they should respectfully attain the age of twenty-one years or marry; and at the happening of either event, the complainants Mary, John, and Sarah, each to have one-third of the property or money remaining in the hands of the trustee.

It further appears that on the 15th day of June, 1840, the Planter's Bank recovered a judgment in the circuit court of Giles, against said John K. Yerger and others, for the sum of \$1,626 73, upon which judgment an execution was issued on the 4th of May, 1841, and was levied on the lot in question, and the same was sold by the sheriff, on the 19th of June, 1841, to the Planter's Bank, at the price of \$500. From the foregoing dates it will be seen, that more than twelve months elapsed from

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the rendition of the judgment, before the sale of said lot by the sheriff.

It further appears, that on the 27th day of June, 1840, twelve days after the recovery of the foregoing judgment by the Bank against said John K. Yerger, he, said Yerger, not having previously executed a deed to Wooldridge, made a conveyance in fee of said lot to said John C. Walker, "as trustee for John P. Wooldridge," in pursuance of the title bond executed to Wooldridge, as the conveyance recites.

On the 21st of April, 1842, the sheriff conveyed said lot to the Planter's Bank, under whom, by several intermediate conveyances, the defendant White claims title. In April, 1842, the Bank took possession of said lot, since when the Bank and those deriving title to said lot from the Bank, have had an uninterrupted possession of the same, holding adversely to the right of the complainants and their trustee, and all other persons.

Wooldridge died in 1845. Prior to the execution of the deed of trust of March 1839, he had been subject to occasional derangement of mind, but very shortly after the date of said deed, he became utterly insane, and so continued up to the time of his death.

In September, 1841, Walker, the trustee, made an application to the chancery court, at Pulaski, to be permitted to resign his trust. The proceeding was regularly conducted in pursuance of the act of 1831, ch. 107, § 1. On the hearing, the chancery court decreed that his resignation be accepted and received, and that he be released and discharged from further responsibility on account of said trust." And the chancellor thereupon proceeded to appoint Elisha White trustee, "in the room

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and stead of said Walker resigned," and directed that he should enter into bond, conditioned for the faithful performance of his duty as such trustee; and "that he take all of the trust funds into his possession not heretofore disposed of." White, pursuant to his appointment, executed bond and security and accepted the trust. A schedule of the trust property, real and personal, which came to the possession of White as trustee, made out by him on the 20th of April, 1842, is exhibited in proof, in which the lot in Pulaski is stated to have been sold by the Planter's Bank upon its judgment against Yerger, "and so lost to the *cestuis que trust*."

White, the trustee, died in the year 1844. He took no steps to resist the sale of the lot by the Bank, but seems to have acquiesced therein, regarding it as valid. Since his death, no other appointment of a trustee has ever been made.

This bill was filed on the 7th of February, 1852. The Bank and the several successive purchasers of the lot, claiming under the Bank, and Walker, the original trustee, are made defendants to the bill; and it is sought to have the sheriff's deed and the subsequent conveyances declared void; the possession of the lot surrendered to complainants, and an account of the rents and profits since April, 1842.

The chancellor decreed the relief prayed for, and the defendants have brought the case here by an appeal.

The decision of this case rests upon the question, whether or not the statute of limitations of 1819, interposes a bar to the relief sought by the bill. It is very clear that the sale of the lot upon the execution in favor of the Bank against Yerger, not having been made

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within twelve months from the rendition of the judgment, was for that reason wholly inoperative against the conveyance from Yerger to the trustee made subsequent to the levy, to communicate any title to the bank. A sale within the period of twelve months, would have overreached and avoided the intermediate alienation by the judgment debtor to Walker; but the sale not having been made within the time limited, the lien of the judgment ceased to exist at the expiration of the twelve months from the time judgment was rendered, and the voidable title of the trustee became perfect instantly upon the extinguishment of the creditor's lien. 1 Swan's R., 516. This being so, Walker as trustee, became invested with a valid and exclusive title to the lot in question, by force of the conveyance from Yerger on the 27th of June, 1840. And this leads us to consider of the legal effect of the proceeding in chancery instituted by Walker, to be discharged of the trust. This proceeding was consummated on the 11th of September, 1841, and prior to the commencement of the adverse possession of the lot by the bank, which had its inception in April, 1842.

The decree accepting the resignation of Walker and discharging him of the trust, and appointing White in his stead, is silent as to the title of the trust property; it does not in terms, either divest the legal title out of Walker or vest it in White, and the act of 1831, under which this proceeding took place, contains no provision for a change or transfer of the title to the trust estate, from the trustee who is permitted to resign to the successor appointed by the court. What then becomes of the legal title to the trust property, upon the resignation of the trustee? This is a question by no means free from

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difficulty. To hold that the title still remains in the trustee, after he is formally discharged of the trust, would seem to be absurd. Upon this construction of the act, the resignation of the trustee and the appointment of another in his stead, would be alike inoperative; because, while it would fail to discharge the first trustee effectually, from all future liability, it would leave his successor destitute of the power of exercising legal control over the trust property, for the want of title. To give the act any sensible construction or effect, it must be held, therefore, that upon the discharge of the first trustee, by implication of law the title is transferred to and becomes vested in the successor appointed by the court; and for the same reason, a like construction and effect must be given to the decree of the chancellor in the present case.

The title to the lot in controversy, could not be in *abeyance*, and if it ceased to exist in Walker by force of the decree, it cannot in view of the act of 1831, be held either to have reverted to the grantor or to have passed to the *cestuis que trust*. It must, therefore, of necessity, be held either to have remained in Walker, notwithstanding his resignation; or to have passed by operation of law, to White the appointee of the court, and upon either of the latter assumptions, so far as respects the application of the statute of limitations to the present case, the result would be the same. For neither was under any legal incapacity to sue, or within any exception of the statute in April, 1842, when it is admitted that the adverse possession commenced. The statute then attached, and having commenced running, its operation could not be arrested or suspended otherwise than

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by a suit in law or equity effectually prosecuted. 1 Swan's R., 96, 106. The death of White in 1844, and the neglect to appoint another trustee in his place, can therefore have no effect in preventing the bar of the statute in the present case, and it is well settled that if a trustee, having the legal title, is barred by operation of the statute of limitations, the *cestui que trust* is also barred though an infant.

The trustee, White, having died before the purposes of the trust were accomplished, and consequently before the termination of the trust estate, the title cannot be considered as having passed by operation of law, to the *cestui que trust* upon his death. This is not a case for the application of the principle laid down in *Smith vs. Thompson*, 2 Swan, 386. *Vide post Aikin vs. Smith*, p. 304. Neither is it a case for the application of the well settled principle relied upon in this case, that between successive wrong doers having no title, there can be no privity so as to allow of their possessions being united to make out the length of time requisite to form the bar of the statute of limitations. The possession under the sheriff's deed was as operative under the first section of the act of 1819, as if it had been subject to no exception. The deed purports on its face, to convey an estate in fee simple; and, though voidable or even void in its inception, yet it constitutes a sufficient assurance of title under the statute, to vest an indefeasible title coupled with seven years adverse possession.

We feel constrained, therefore, to hold that the statute of limitations forms a bar to the relief sought by the complainants' bill.

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The decree will be reversed and the bill dismissed, but without prejudice and also without costs.

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H. W. ALKIN *et al.* vs. JACOB SMITH.

1. REMAINDER. *When vested. Life estate settled upon trustee with directions to convey remainder at the falling in of the life estate.* Where a donor by deed, conveyed certain slaves to a trustee to the use and benefit of said donor's daughter during her life, and at her death to be conveyed to the children of said daughter, such trust estate continues no longer than is required by the purposes of the trust, and the legal effect of the deed is, to convey a vested remainder to the children, to take effect in possession at the death of the mother; on the happening of which event, they instantly became invested by operation of law with a legal estate and interest in the slaves.
2. SAME. *Same. Where a conveyance of remainder by trustee may be presumed.* Where the legal title has been vested in a trustee either in fee or for a limited term of years, a conveyance or surrender of the legal estate by the trustee, may, in some cases be presumed, and this presumption will be made equally in the case of a deed or will — as where it is the duty of a trustee to convey — where there is sufficient reason for the presumption. and where the object and effect of the presumption is to support a just title.
3. SAME. *Same. Same. Illustration of the rule. Limitation.* Where there is an express direction or provision in the trust instrument for a conveyance of the legal estate by the trustee, at a certain specified period, the duty being more cogent, the presumption of conveyance will the more readily arise. Thus, where a trust estate in slaves was created in 1828, for the use and benefit of a tenant for life, in possession; remainder to be conveyed by said trustee to the children of said tenant for life, at the termination of said life estate; and the life estate ends in 1841, the children being all then minors, and the trustee dying in 1850, a bill is filed by the children in 1852, (some of whom were still under disability,) to recover said slaves, who had been sold by the tenant for life in 1833, to the defendant, who had notice of their claim, and who had held the slaves as his own ever since; a presumption arises in such case that the trustee surrendered the legal estate at the proper time, and the purchaser cannot protect himself under



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the statute of limitations by reason of the trustees' failure to sue within three years after the falling in of the life estate. [*As to the statute of limitations, CARUTHERS, J., dissented.*]

4. INNOCENT PURCHASER. To entitle a defendant in a suit against him to recover property purchased by him to the protection extended to an innocent purchaser, his plea or answer must deny notice of the claimant's title previous to the execution of the deed and payment of the purchase money; and when the fact is within the defendant's own knowledge, notice must be denied positively, fully and precisely, even though it be not charged on the other side, and the notice so denied, must be notice of the existence of the claimant's rights, and not merely notice of the title papers evidencing such rights.

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FROM ROBERTSON.

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This bill was filed in Chancery at Springfield, by the complainants as children of Elizabeth Aikin, deceased, against the defendant, to recover from him certain slaves, which they claim under a deed of gift from their maternal grandfather, David C. Williams. The bill was filed on the 20th of March, 1852. It appears that David C. Williams in 1828, made a deed of gift to Ezekiel Aikin in trust for the "reasonable support" of the donor's daughter, Elizabeth Aikin, during her life, and at her death, "to be conveyed and delivered over" to the surviving children of said Elizabeth. The deed was acknowledged by the maker on the day of its execution, before the "clerk of the district court of chancery at Franklin," but was never registered until the 11th of February, 1852. At the time of the execution of the deed, Elizabeth Aikin, with her husband, Armstead Aikin, and such of the complainants as were then in being, resided in Maury county; but soon after removed to Robertson county, having the slaves in possession. On the 24th of August, 1833, said Elizabeth, her husband, and David T.

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Lewis, her son by a former marriage, sold and conveyed two of the slaves to defendant, Jacob Smith, executing their bill of sale of that date. Armstead, the husband, at the time he signed the bill of sale, it seems, told the defendant, that he, Armstead, had no title. The bill of sale was not registered, and the defendant took possession of the slaves and has held them ever since said purchase up to the filing of this bill. In part consideration for said slaves it seems that said defendant sold to said Elizabeth and children a small tract of land of fifty acres, in the county of Robertson, upon which most of the children were brought up. As evidence of this sale a deed was produced, bearing date 9th of November, 1844, but was not recorded until after the filing of this bill. Elizabeth Aikin died on the 1st of April, 1841, the complainants being all at that time minors, David T. Lewis having died some time before. The trustee died in 1850, and it does not appear that he ever conveyed the estate as required by the deed on the death of said Elizabeth, or at any time thereafter. Nor, indeed, does it appear that he ever accepted or acted under the trust in any way. It seems that the said Aikin and wife had possession of the slaves some six or seven years before the execution of the deed of gift by Williams. At the time of the filing of the bill some one or more of the complainants were still under age. The Chancellor, BRIEN, dismissed the bill, and complainants appealed.

JO. C. STARKE, for the complainants.

Low, for the respondents.

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McKINNEY, J., delivered the opinion of the court.

This bill was brought to recover certain slaves in the possession of the defendant. It appears that on the 5th of November, 1828, David C. Williams, the maternal grandfather of complainants, made a deed of gift, by which he conveyed to Ezekiel Aikin, his executors, administrators and assigns forever, a female slave named *Delph*, and her two children, Jack and Mary, in trust, to permit his daughter, Elizabeth Aikin, then a *feme covert*, wife of Armstead Aikin, to have the use and benefit of the services of said slaves during her natural life; and, upon the further trust, "at and upon the natural death of said Elizabeth Aikin," to convey and deliver over said negro slaves, with their increase, to such children of "said Elizabeth, as might then be living," &c. This deed, though acknowledged in 1828, was not registered until the 11th of Feb., 1852, shortly before the filing of this bill. Mrs. Aikin had been previously married to one Lewis, and of that marriage, two children, David and Jane Lewis, were living at the date of the gift.

On the 24th of August, 1833, Mrs. Aikin, made an absolute conveyance, (in which her son, David Lewis, joined,) of the slave *Delph*, and a child born after the date of the deed of gift, to the defendant, Smith, for the alleged consideration of \$350; and he has retained them in his possession ever since, claiming them as his own. The other children of *Delph*, were previously disposed of by Mrs. Aikin to other persons. Mrs. Aikin died in April, 1841, leaving six children, the complainants in this cause, surviving her, the issue of the second

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marriage with Aikin; all of whom were under the age of twenty-one years at his death. The two children of the former marriage above mentioned, both died in the lifetime of Mrs. Aikin. The present bill was filed on the 20th of March, 1852, at which time one of the complainants was still a minor. The trustee, Ezekiel Aikin, died in 1850. It does not appear that he ever accepted the trust, or assumed any of the duties imposed upon him as trustee. Nor is there any proof that he ever made a conveyance of the slaves to the complainants, as was expressly made his duty to do by the terms of the deed. A deed of conveyance is exhibited in the record, executed by the defendant, Smith, bearing date 9th November, 1844, three years after the death of Mrs. Aikin, but not registered until after the filing of the bill in this case. Said deed purports to convey to complainants by name, fifty acres of land, "for the consideration of two negroes, with \$245," received from Mrs. Elizabeth Aikin, the mother of complainants. The complainants repudiate this conveyance, and allege that it was made, proved, and registered without their knowledge; that they never accepted it, and disclaim all benefit under it. The proof shows that Aikin and wife resided upon said land for many years, together with the complainants, and that it probably constituted the consideration for the two slaves to the defendant. Upon the foregoing facts the Chancellor dismissed the bill. The relief sought by the complainants is resisted upon several grounds:

1. It is insisted that the trustee having failed to convey the slaves to the complainants, on the death of Mrs. Aikin, in whom the life interest was vested, the

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legal title remained in him; and having neglected to sue within three years from the termination of the life estate, he was barred by the statute of limitations; and consequently, the complainants are likewise barred. And to maintain this position, the case of *Williams vs. Otey*, 8 Humph., 563, is relied on.

We need not, in the present case, stop to enquire in what case an express limitation of an estate in fee to trustees, contained in a deed, may be cut down or restricted to a smaller estate, on the ground that, to give to such a limitation its full effect would be clearly inconsistent with the intention and purposes of the instrument. This doctrine was considered in the case of *Smith vs. Thompson*, 2 Swan, 386. In that case, as in the one under consideration, the interest of the trustee is expressly restricted by the terms of the instrument, to the life of the person to whom the life interest is given. But the cases are distinguishable, if indeed, it be a solid distinction, in this, that in the present case, the trustee is directed on the death of the owner of the life interest, "to convey" the slaves to the persons entitled in remainder; and upon the force and effect to be given to this requirement the argument against the right of the complainants depends. From the failure of the trustee to make a formal conveyance of the slaves to the complainants, on the falling in of the life estate, the consequence is deduced that the legal title continued in him, and therefore the statute of limitations attached at the death of the tenant for life. We do not assent to the correctness of this conclusion. We are not by any means prepared to admit that a conveyance from the trustee was necessary to perfect the title of the com-

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plainants. The position, we think, may be well maintained that the interest, or estate, of the complainants is created, not by the execution of the power to convey, conferred upon the trustee, but by the deed itself. By the express terms of the deed, the trust estate is not to continue beyond the period required by the purposes of the trust. The legal effect of the deed is to convey a vested remainder, to take effect in possession at the death of Mrs. Aikin; and on the happening of that event, the complainants, by operation of law, instantly became vested with a legal estate, or interest, in the slaves. This would be so in the case of a will, and we see no reason why it should not be so in the case of a deed also. See 4 Kent's Com., 204, margin. But, upon another ground, the conclusion insisted upon by the defendant's counsel, may be successfully repelled. It is well settled, that in some cases where the legal title has been vested in a trustee, either in fee, or for a limitation of years, a conveyance or surrender of the legal estate by the trustee may be presumed. And this presumption will be made equally in the case of a deed or will. Hill on Trustees, 253. Three circumstances, it is said, are requisite to raise such presumption: 1. It must have been the duty of the trustee to convey. 2. There must be sufficient reason for the presumption. 3. The object of the presumption must be to support a just title. *Ibid.*

In *Doe vs. Sybourn*, 7 Term R., 2, it is said that where trustees ought to convey to the beneficial owner it would be left to the jury to presume where such a conveyance might reasonably be made, that they had conveyed accordingly, in order to prevent a just title

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from being defeated by a matter of form. And where there is an express direction, or provision in the trust instrument, for the conveyance of the legal estate by the trustee at a certain specified period, the duty being more cogent the presumption will more readily arise. *Ib.* 254. No very definite general rule seems to be laid down as to the number of years, or the precise circumstances which will be considered sufficient to support such presumption. This is a conclusion to be drawn from the circumstances of each particular case. *Id.* 258. In *England vs. Slade*, 4 Term R., 682, a devise of real estate had been made to trustees, in trust for the testator's son, and to convey to him immediately on his attaining twenty-one. The son arrived at age in 1788, and in the following year he made a lease of the property devised. In the year 1792 the lessee brought ejectment. There was no proof of any conveyance from the trustee to the son; and the court of King's Bench held that a conveyance was to be presumed. Lord Kenyon, in delivering the judgment, said: "There is no reason why the jury should not have presumed a conveyance from the trustees to him, the son, upon his attaining the age of twenty-one, in pursuance of the trust. It was what they were bound to do, and what a court of equity would have compelled them to have done, if they had refused. But it is rather to be presumed that they did their duty. And as to the time, the jury may be directed to presume a surrender or conveyance in much less time than twenty years." In that case the time was but three or four years; but, in the case under consideration, some eleven years had elapsed from the death

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of Mrs. Aikin before the commencement of the present suit. We hold, therefore, upon the foregoing authorities, that to prevent an apparently just title from being defeated by a matter of form, a conveyance from the trustee is to be presumed in this case; and it must be taken to have been made at the point of time when it ought to have been made, the death of Mrs. Aikin.

In this view, the statute of limitations has no application to the case. The complainants were all minors at the death of their mother, when their right of action first accrued; and that disability not having been removed as to all at the time this bill was filed, they are all within the saving of the statute. 5 Yerg. R., 17. 1 Swan's R., 501.

2. The defendant cannot repel the complainants on the ground of the non-registration of the deed of gift. He has wholly failed in his answer, or by proof, to place himself upon the foot of a *bona fide* purchaser without notice. To entitle him to the protection extended to an innocent purchaser, the plea, or answer, must deny notice of complainants' title or claim previous to the execution of the deed, and the payment of the purchase money; and, where the fact is within the defendant's own knowledge, notice must be denied positively, fully and precisely, even though it be not charged on the other side. Story's Eq. Pl., 662. And the notice so denied, must be notice of the existence of the complainants' rights, and not merely notice of the instrument, or title papers, evidencing or establishing such right. Here, the denial goes no further than the defendant's knowledge or information, "as to the paper



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called a deed of gift," exhibited in the bill. Notwithstanding this negation, the defendant may have had full notice of the unquestioned claim or right of the complainants to the slaves in controversy, or at least, notice sufficient to have put him upon enquiry. But the proof of Armstead Aikin, and other circumstances in the case, show that, in point of fact, he had notice. At the time of the execution of the bill of sale, the witness, Aikin, informed the defendant that he had no title to the slaves, to which defendant replied, that "if he had no title, it would not hurt to sign it." But, as the defendant has failed to put his defense upon this ground, we need not take the trouble of commenting upon the facts, tending to fix him with notice, and to show the *mala fides* of the transaction.

3. The pretended conveyance to the complainants for the fifty acres of land, interposes no obstacle in the way of complainants. No such recognition, or adoption of the alleged contract of purchase between Mrs. Aikin and the defendant, or of acceptance of the pretended conveyance, appears in this record, as would be sufficient to estop even such of the complainants as were liable to be concluded by their own acts.

And, lastly, the assumption that Armstead Aikin, the father of complainants, had acquired a title to said slaves by more than three years adverse possession, prior to the deed of gift from Williams to the trustee, is wholly unsupported by the proof.

The result is, that the complainants are entitled to have the slaves surrendered to them, and to recover the hire since the death of Mrs. Aikin.

Decree reversed.

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A. F. McFerrin *et al.* vs. Albert Perry.

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CARUTHERS, J., dissented upon the point as to the application of the statute of limitations.

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[NOTE.—The decree in the foregoing case, gives the slaves to the complainants with their reasonable hire from the death of Elizabeth Aikin, until they should be delivered up, with interest annually thereon, and annuls the contract for the sale of the land, giving the defendant his reasonable rent against the complainants, for its use and occupation since the death of Elizabeth Aikin, with interest annually thereon; remanding the cause for an account, and directing the costs of suit to be paid out of the funds arising from the hire of the slaves. R&P.]

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A. F. McFERRIN, *et al.* vs. ALBERT PERRY.

REPLEVIN. *Estoppel.* Defendant claiming by exchange or purchase from the vendor of the plaintiff. The distinct and peculiar object of the action of replevin, is to recover in *specie* some personal chattel which has been taken and detained from the owner's possession, with damages for the detention. The plaintiff must prove either a general or special property in himself, and will be defeated if the proof shows the right of property and possession to be in a stranger. So where the plaintiff and defendant both claim under the same person, the plaintiff by purchase and the defendant by exchange, the defendant is not estopped by his relation to the party under whom both claim, to show that the title was not in said party but in a stranger, and if he succeeds in so doing, the plaintiff must be defeated.

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FROM CANNON.

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The plaintiffs in error, who were plaintiffs below, instituted their action of replevin in the circuit court, against the defendant, for a mare which they had purchased from one Hodge and afterwards loaned to him.

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Hodge, while in possession under the loan, swapped the mare to the defendant for a horse. There was proof introduced by the defendant in the court below, that the mare really belonged, when the plaintiffs bought her, to the son of Hodge. There was verdict and judgment for the defendant, Judge MARCHBANKS, presiding, from which plaintiffs appealed in error. The court charged the jury in effect, that the defendant's relation to Hodge did not estopp him from showing that Hodge had no title at the time of the purchase by the plaintiffs; and if such fact appeared in proof, the defendant was entitled to a verdict.

READY and E. H. EWING, for the plaintiffs in error.

E. A. KEEBLE, for the defendant in error.

CARUTHERS, J., delivered the opinion of the court.

This is an action of replevin for a sorrel mare, of the value of \$75. There were two verdicts for the defendant, and from the judgment of the court refusing a new trial, an appeal is taken to this court.

The mare was bought by the plaintiffs from Thomas Hodge in 1848, and left in his possession as a loan, with liberty to repurchase her by the 25th December, following. She remained in the possession of Hodge in 1848-9, except a part of the latter year, she was taken by the plaintiffs into their possession, but returned again to Hodge, who all the time stated that she belonged to the plaintiffs. Early in 1850, Hodge swapped off the said mare to defendant Perry. There was proof tending to

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show that the mare never was the property of Thomas Hodge, but had been given when a small colt to his son Calvin Hodge, who was an infant, and lived with his father the said Thomas.

The only questions made here, are upon the charge of the court. His Honor charged the law to be, that it was competent for the defendant in this action, to show that the title to the property replevied was not in the plaintiff, but some third person, and thereby defeat the action, and that in this case, the fact that the mare was loaned to Thomas Hodge by the plaintiffs after their purchase from him, would not estopp the defendant from relying upon this defense.

The peculiar and distinct object of this action, is to recover in *specie* some personal chattel, which has been taken and detained from the owner's possession, with damages for the detention.

To this action there were various pleas before our Statute of 1846, ch. 65, § 7, which provides that under the plea of *not guilty*, all special matters of defense may be given in evidence. By the common law, the general issue was *non cepit*, which admits the plaintiffs title, and only puts in issue the taking of the property. But besides this plea, the defendant might also plead specially, that the property was either in himself or another, and traverse the right of the plaintiff.

Under this plea the material enquiry is, as to the property of the plaintiff, which he must be prepared to prove.

If this issue is found against him, that is, that the property is not in him, he cannot succeed. 2 Greenl. Ev., 563.

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Since the passage of our act, no special pleas are necessary, but all matters of defense by the general law may be relied upon under the single plea of *not guilty*.

The plaintiff cannot succeed then, unless he is prepared to prove either a general or special property in himself, and will be defeated if the proof shows that the right to the property and possession is in a stranger.

This is not a case for the application of the doctrine of estoppel, and is not analogous to the case of landlord and tenant. The defendant is not the bailee of the plaintiffs. He claims by purchase or exchange, and cannot be regarded as standing in the shoes of Thomas Hodge, in regard to his relations to the plaintiffs. It is not necessary to decide how the law would be upon this question, if the suit were against Thomas Hodge. It is enough for this case to say, that the present defendant has a right to shew that the plaintiffs have no title, or that the legal right to the property is outstanding in Calvin Hodge, or any one else; and if he succeeds in doing so, the plaintiffs must be defeated.

The judgment will be affirmed.

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Charles D. Lockart vs. Albert Northington.

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CHARLES D. LOCKART vs. ALBERT NORTINGTON.

WILL. *Where it declares a power to sell land without naming donee of the power. Executor.* If a will direct an estate to be sold, not naming a donee of the power, such power devolves by implication upon the executor, provided he is charged with a distribution of the fund. So, where a testator appoints his executor, and directs the sale of his real estate, and a division of the fund among his legatees, but does not say by whom the land is to be sold or the fund to be distributed, it being the duty of the executor to pay legacies, he has power under such will, to raise the fund by a sale and conveyance of the land.

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FROM MONTGOMERY.

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This was an action of trespass *quare clausum fregit* instituted in the circuit court of Montgomery by Lockart against Northington, and submitted to a jury before Judge PEPPER, at the January Term, 1853, of said court. There was verdict and judgment for the defendant, from which the plaintiff appealed in error to this court.

DUDLEY for the plaintiff.

ROBB and BAILEY for the defendant.

TOTTEN, J., delivered the opinion of the court.

Trespass *quare clausum fregit*. There was judgment for the defendant, and plaintiff appealed in error.

The case involved the title to the land, and the plaintiff, in deraigning title, read in evidence the will of David McFadden, by which he gives to his wife

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his estate, both real and personal, to have and to hold during her life. He then makes special bequests and devises in remainder, to take effect in possession, at the death of his wife. The will then proceeds as follows, to wit:

"It is my will and desire, that after the death of my wife, that all my property be sold, the perishable property on a credit of twelve months, the purchaser giving bond with approved security; also, all my land, except such as is already given away, to be sold on a credit of one and two years; substantial security is to be given by the purchaser. And my express will and desire is, that after the money is collected, and Mary Jane and Ruth Ann McFadden receive their three hundred dollars, that the balance be equally divided among my beloved children," &c. The testator appointed William Lockart executor of his will.

The plaintiff then read in evidence a deed executed by William Lockart, executor as aforesaid, to Charles D. Lockart, for the land in question; and upon this part of the case, his Honor, the circuit judge, instructed the jury that the will conferred no power upon the executor to sell and convey the land; that his deed was inoperative, and therefore, that plaintiff could not maintain his action. It is now said that in this there is error.

The will, it will be seen, declares a power to sell the land at the termination of the life estate, and directs how the fund shall be distributed or administered; but it does not name the donee of the power, or state expressly by whom it shall be executed. In this respect it simply appoints an executor without more.

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The rule in such case seems to be, that if a will direct an estate to be sold, not naming a donee of the power, the power devolves by implication upon the executor, provided he is charged with the distribution of the fund. 1 Sugden on Powers, 134. 4 Kent's Com., 327. *Beatell vs. Wilder*, 1 Aik. R.; 420. *Darom vs. Fanning*, 2 John's Chan. R., 254.

Now, as to the fund to be raised by the sale, it is charged first with the payment of a legacy of \$300, the balance to be equally divided among the testator's children. It is of course the duty of an executor to pay legacies, and to raise the fund in the manner directed by the will; and we are of opinion that it was the intention of testator that the fund arising from the sale should be distributed by the executor. 2 John's Ch. R., 254. If this be so, it must result that the executor had power under the will to sell and convey the land. The circuit court erred in holding a contrary opinion.

2. As to the execution of the power, assuming it to be vested in the executor, that is a matter not considered in the court below, nor attended to in argument here. We therefore make no questions upon it, but merely state the general rule, which is, that the "intention of the grantor of a power as to the mode, term and conditions of its execution, must be observed."

Let the judgment be reversed, and the cause be remanded.

Judgment reversed.



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C. W. Nance's *lessee* vs. John W. Thompson.

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C. W. NANCE's *lessee* vs. J. W. THOMPSON.

1. AMENDMENT. *Of declaration in ejectment. Statute of limitations.* A new demise may be inserted in the declaration in ejectment, even after the statute of limitations would have barred the suit, unless it introduces a new or substantive cause of action which existed when the writ was issued; and such amendment, when made, relates back to the commencement of the suit, and places the case and the rights of the plaintiff upon the same ground as if it had been originally incorporated in the writ and declaration.
2. ARBITRATION. *Setting aside the award.* Where a mixed question of law and fact is submitted to arbitrators and it appears from the face of the award, or some writing referred to or accompanying the same, that the arbitrators intended to decide according to law but were mistaken as to the same, it is a sufficient reason for setting aside the award so far as it is affected by the mistake.
3. SAME. *Same. Motion in arrest of judgment.* Where matters in litigation in the circuit court, are, by agreement of parties, ordered to be submitted to arbitrators for settlement, the award, if unsatisfactory to either, must be attacked by motion before judgment to set aside. But it seems that after the award has been confirmed by the judgment of the court, a motion in arrest of judgment may be treated and understood as a motion to set aside the award, though technically irregular.

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FROM DAVIDSON.

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This was an action of ejectment in the circuit court of Davidson. It appears that the defendant took possession of the land in controversy in January or February, 1844, and this suit was commenced against him on the 25th December, 1850. The first count of the declaration stated a demise in the name of C. W. Nance, but it appearing upon investigation that the land was conveyed to Nance by the representatives and devisees of James Jackson after the adverse possession had been taken by defendant, leave was asked and granted, to

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C. W. Nance's *lease* vs. John W. Thompson.

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insert a count or counts in the names of those representatives and devisees. This was done accordingly on the 4th of June, 1851. The case was then referred to arbitrators, who made their award in favor of defendant on the 12th of May, 1853, which is copied into the opinion. The award was returned into the circuit court at the May Term, 1853, and confirmed by its judgment. At a *subsequent day of the term* the plaintiff moved in arrest of judgment, which being overruled by the court, Judge BAXTER presiding, he appealed in error to this court.

MEIGS and McDONALD, for the plaintiff.

EWING & COOPER, for the defendant.

McKINNEY, J., delivered the opinion of the court.

This was an action of ejectment in the circuit court of Davidson, commenced on the 25th day of December, 1850.

The declaration as originally framed, contained but a single count on the demise of C. W. Nance. In the progress of the cause, to-wit, on the 4th of June, 1851, the lessor of the plaintiff obtained leave to amend the declaration, and two other counts were added; one on the demise of the executors and trustees of James Jackson, deceased, and the other on the demise of the heirs at law of said James Jackson.

It seems that the land in controversy in this action, had been sold and conveyed to Nance by the representatives and devisees of James Jackson, after the com-

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mencement of an adverse possession by the defendant, who, it appears, entered upon and took possession of the premises in January or February, 1844.

The object of the amendment was to avoid as well the *champerty* act of 1821, as the statute of limitations; more than seven years having elapsed from the time of defendant's adverse entry, before the period when leave to amend the declaration was obtained. Sometime after the additional counts were filed, by mutual consent, an order was made by the court referring all matters in dispute between the parties in this cause, to the final award and determination of two gentlemen of the bar, whose award was to be made the judgment of the court. At the May Term, 1853, the arbitrators returned their award in the following words:

"Whereas, at the — Term, 185—, of the circuit court of Davidson county, Tennessee, the case of Jno. Den, *lessee* of C. W. Nance, against John W. Thompson, pending therein, was referred to us by order of said court, to arbitrate and settle, and we having met for that purpose, and after hearing the proof and argument of counsel on both sides, decide the case for the defendant: On the first count, upon the ground that the land in controversy was adversely held by the defendant at the time it was purchased by C. W. Nance; and on the second and third counts, upon the ground that these counts, (the demises being from different parties,) are not distinguishable so far as respects the statute of limitations, from new actions. The adverse possession began at least as far back as January or February, 1844, and leave to file the second and third counts was obtained in May, 1851. As to these counts, then, the statute

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C. W. Nance's *lessee* vs. John W. Thompson.

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of limitations forms a bar, and the action fails. This 12th May, 1853."

Upon this award judgment was rendered that it be confirmed and made the judgment of the court; that the defendant go hence and recover his costs, &c. Which judgment appears to have been rendered on the 16th of May, and the record shows that on a subsequent day of the same Term, the plaintiff "moved the court in arrest of judgment, which motion was overruled."

From the judgment of the court upon the award, an appeal in error has been prosecuted to this court.

For the plaintiff in error it is argued that from the statement on the face of the award, showing the grounds or reasons for the conclusions the arbitrators arrived at in making their award, it is clear that they made a mistake in point of law, for which the award ought to have been set aside. On the other side it is maintained, in the first place, that if such mistake were shown to exist, the award, nevertheless, would be binding upon the parties, and that the alleged mistake of the law forms no valid objection to the award.

In the next place it is contended that the decision of the arbitrators is correct in point of law. And, lastly, it is said, if the supposed error were shown to exist it could not be reached in the mode attempted in the court below.

As respects the last point, the proper course would certainly have been a motion in arrest of judgment. The latter motion, in its legal sense and application, was not appropriate nor adapted to the purpose. It was competent to the court, however, and would indeed

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have been a positive duty, at any time during the term, to set aside the judgment and reject the award, upon being satisfied that it was erroneous, for the reason alleged, and we think the motion in this case may be understood and treated as an application to that effect, and that the case is to be considered as if a motion had been regularly made before judgment to set the award aside.

The next inquiry is: Supposing the arbitrators to have mistaken the law, can the award be avoided on that ground?

The authorities lay it down that an award may be set aside for mistake, either in fact or in law, by the arbitrators making the award. *Watson on Arbitration*, 281. But the mistake must appear on the face of the award, or, as it would seem, in some writing of the arbitrators referred to, or accompanying the award.

A distinction seems to be recognized between a mistake in respect to a mere question of law and a mixed question of law and fact. If a dry naked question of law be submitted to the decision of arbitrators, it is said in some of the cases, that the award, though wrong, is binding upon the parties; as by their submission they agree that their decision shall be the law between them upon the question referred. *Ibid.*, 290, and cases cited in notes. But where a question of law and fact is referred, it is held that where it appears from the face of the award that the arbitrators intended to decide according to law but were mistaken as to the law, this is a sufficient reason for setting the award aside, at least so far as it is affected by the mistake. If, however, the arbitrators, disregarding what they know to

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be the law of the case, or leaving it entirely out of their consideration, make what in their judgment, under all the circumstances of the case, is deemed to be a proper or equitable decision of the matter, it is no valid objection to the award that it is manifestly against law, provided they be not required by the terms of the submission to follow the law in making their award. It must clearly appear, not only that the arbitrators are mistaken in point of law, but likewise that they intended to follow the law, and would not have made such an award if they had known what the law was.

Arbitrators are clearly not bound to state the grounds of their decision; and unless it appear from the face of the award that they intended to be governed by the case and were mistaken, the presumption is that they have decided according to law. But where they state the facts and their deduction of law, then it is for the court to say whether they have or have not drawn the proper conclusions. For the foregoing general principles, see the authority above referred to, and cases cited in the notes.

Applying these principles to the case before us, the arbitrators, having stated in their award the grounds of their decision, and it being clearly apparent that they intended to decide according to the law of the case, it follows that if their conclusions were mistaken in point of law, the award ought to have been rejected.

And this brings us to the remaining question:—Were the arbitrators mistaken in their legal conclusions? We think they were. The award shows that they decided against the plaintiff's right to recover, because

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the conveyance to Nance being affected by champerty, there could be no recovery on the demise in his own name; and forasmuch as the amended counts were to be regarded as new actions, a recovery upon them was barred by the statute of limitations.

In this decision, the legal effect of the amendment, both as respects the question of champerty and the statute of limitations, was misapprehended. It is clear upon the assumption of the award that no recovery could be had upon the first count, but it is equally clear that so far as champerty is concerned, the plaintiff was entitled to recover on the amended counts. It is held in *Wilson and Wheeler vs. Nance*, 11 Humph., 189, 191, that a champertous conveyance being ineffectual to convey the title to the purchaser, the title must be considered as remaining in the vendor; and therefore he may sue and recover the land, and his inoperative deed to the purchaser, cannot be set up by a third person in bar of his right of recovery. But, such recovery by him would enure to the benefit of the purchaser, at least by way of estoppel; and furthermore, that the purchaser in such case may maintain ejectment and join a count on the demise of his vendor, and in this mode recover the land sold and attempted to be conveyed to him. So that in this case the matter of champerty interposed no valid objection to the plaintiff's right to recover. Nor did the statute of limitations interpose a bar to a recovery. The assumption that the additional demises were to be regarded as new actions, was not, in this case, correct. The effect of the new counts was not to introduce either a new right of action or new parties, in the

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sense of the rule which forbids such an amendment. By his contract of purchase, Nance acquired a right to the land, notwithstanding the legal insufficiency of the deed to pass the title, and upon well established principles had a right to recover the land. His action was commenced in time to save the bar of the statute, and all that stood in his way to a recovery, was the omission of a count in the declaration on the demise of his vendor. The propriety of allowing such a count to be added at an earlier stage of the case, before the lapse of seven years from the commencement of the defendant's adverse possession, is not questioned; and the propriety of permitting such an amendment after the expiration of that period, and with the sole view of preventing the operation of the statute of limitations, is, we think, no less apparent, and no less sanctioned by sound principle, or by the proper meaning of our statutes of amendment.

We assent to the correctness of the decisions which hold that an amendment cannot be allowed by inserting a new demise in the name of a third person, between whom and the lessor of the plaintiff there is no privity, and upon a different title, having no relation to that of the lessor. Such demise would not be distinguishable from a new action. But that case is wholly different from the present. Here, no different title is sought to be set up; no new right or cause of action is attempted to be presented as a ground of recovery. It is rather a different statement of the same cause of action or right of recovery, adapted to a different state of proof. The plaintiff merely seeks, in aid of his right, to use the name of his vendor, as he has the



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right to do, and to draw to the equitable title in himself, the mere dry legal title remaining in the vendor, which it was attempted ineffectually to vest him with.

It can no more be said in the present case, that the effect of the amendment was to introduce a new party or cause of action, than it could in the case of an assignee of a *chose in action*, who had brought suit in his own name, and in the progress of the suit, obtained leave to amend by inserting the name of the assignor, in whom was the mere nominal legal interest. In the latter case, as in the former, such amendment, when made, relates back to the commencement of the suit, and places the case and the rights of the plaintiff upon the same ground as if the amendment had been originally incorporated into the writ and declaration.

If necessary, ample authority might be adduced to sustain this view of the case. Ejectment cases are governed by the same principle, applicable to other civil actions as respects questions of amendment. And since the operation of the recent statute, giving to a verdict and judgment in ejectment the same conclusive force and effect as in other actions, a still more liberal application of the doctrine of amendment will perhaps become necessary in this action.

Under the long established course of practice in this State, it has not been unusual, where a meritorious cause of action was shown to exist, to grant a new trial, or to allow an amendment of the declaration, for the express purpose of avoiding the bar of the statute of limitations. And we are not all inclined to discountenance, much less to change this course of practice.

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. The result is, that the judgment of the circuit court will be reversed, the award set aside, and the cause be remanded for a new trial.

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JACOB A. CLODFELTER vs. H. Cox, adm'r, et al.

1. ASSIGNMENT. *Of Judgment. Notice to the Debtor.* An assignment of a *chose in action* is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor; and this is so, not only as it regards the debtor, but likewise as to third persons. So, an attachment by a creditor in the period intervening between the assignment and the notice, will have preference over such assignment.
2. SAME. *Same. Same.* To perfect an assignment of a *chose in action*, not merely as against the debtor, but also as against creditors and subsequent *bona fide* purchasers, notice must be given to the debtor, and as between successive purchasers or assignees, he is entitled to preference who first gives such notice.
3. GARNISHMENT. *Judgment in the Circuit Court. Jurisdiction of Justice of the Peace.* A judgment in the circuit court cannot be reached by a garnishment before a justice of the peace.

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FROM DAVIDSON.

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This bill of interpleader was filed in chancery at Nashville, by the complainant Clodfelter, upon the state of facts fully given in the opinion. At the May Term, 1853, Chancellor Brien decreed in favor of respondents Cox and Leftwick, from which Langley, another respondent appealed to this court.

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HOUSTON for Langley, with whom was CARLOS DIMICK who said :

1. Is Langley's right to the fund in controversy, defeated by his failure to give Clodfelter notice of the assignment to him?

None of the English cases, except those in bankruptcy, go the length of requiring notice as against creditors and volunteers, and these turn upon the peculiar wording of the bankrupt law of 21 James I, and are not authority for the rule contended for in this case, and I respectfully ask the court to distinguish between these and the other cases to which I shall allude. 2 White & Tudor's Leading Cases, 235.

The first case in which the question of notice was raised as between different assignees of the same fund under contract, was *Cooper vs. Fenmore*, 3 Russ., 60. 3 Con. Eng. Ch. Rep., 295, in which it was held that notice was not necessary, and the weight of authority in the United States, is decidedly that way. 2 White & Tudor's Cases, 236. But since the cases of *Dearle vs. Hall*, and *Loveridge vs. Cooper*, 3 Russ., 1. 3 Con. Eng. Ch. Rep., 266, it is now settled in England that notice is necessary. But in all the English cases, where notice has been held necessary, rights of third parties, rights created by contract had intervened, and they go no farther than to fix the rights of successive purchasers or incumbrancers of the same fund. These cases as well as the subsequent cases in England, rest upon the negligence of the first assignee affecting the rights of innocent third parties; negligence in consequence of which the original assignor was enabled to commit a

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fraud. See the principle of these cases and the reasoning of the court. 2 White & Tudor, 211. Now, do the facts of the case under consideration disclose any such negligence? What innocent third parties' rights are to be sacrificed by such negligence, or has Langley's negligence enabled Gilman to commit a fraud upon any one?

Gilman was indebted to Langley; he and Smiley had become bound for Gilman as endorsers, and to pay the notes endorsed by them or secure the payment, Gilman wished to assign to them his judgment against Clodfelter. Other creditors of Gilman were ready to seize upon the same fund. As soon as the judgment is rendered, Clodfelter is before Esquire Green as a garnishee, probably by a previous agreement, and judgment is rendered against him for this amount of Cox's debt against Gilman. But Langley was a little before him, and while the jury were yet in the box, the assignment was made and entered in the minutes of the court, so that the very record Clodfelter would have to refer to, to ascertain the amount of his indebtedness, would inform him of the assignment. Is here any negligence on the part of Langley? In fact, before Langley, by ordinary diligence, could have served Clodfelter with a notice of the assignment to him, the assignment was defeated by Cox's judgment. All the cases cited require, is, that notice should be given in a reasonable time. But if Langley was guilty of negligence in not notifying Clodfelter of the assignment to him, where is the innocent third party who is to suffer by his default? It is not material to Clodfelter, whether the fund in controversy be decreed to Cox or Langley. He has brought the money into court, and it can be no matter to him whose equity is

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adjudged the best. Then this is not a proper case for the application of the rule as laid down in *Dearle vs. Hall*, and the other English cases, which had been decided without reference to the English bankrupt law.

I have already stated that the English decisions commencing with *Ryall vs. Rowles*, 2 Ves. Sr., 348, turned upon the peculiar wording of the act of parliament, 21 James I, and consequently cannot be referred to as authority in this case; and that they are the only class of English decisions which go the length of requiring notice of the assignment as against creditors of the assignor. Nor did this court go that far in *Fields vs. Marshall et als*, decided at the December Term, 1851, of this court. In that case, Fields had been guilty of great negligence, in consequence of which Marshall had got hold of the money in controversy, under a decree of a court of chancery; and Fields came into this court as a complainant, asking for relief against his own *laches*, and so in the cases of *Dearle vs. Hall*, and *Loveridge vs. Cooper*, 2 White & Tudor, 212. That is not this case. Here Langley is not seeking the aid of this court, but is merely acting on the defensive, while the other party is seeking to enjoin him from pursuing his legal rights. The same distinction is taken in *Evans vs. Bicknell*, 6 Ves., 173, and in *Johnson vs. Irby*, 8 Humph., 654, the right of the assignee was recognised as against the attaching creditor, no notice appears to have been given.

2. Another point is perhaps worthy of consideration, and that is, that the English decisions were made principally in reference to the sale and transfer of annuities, and I believe in none of the cases has the question been discussed in reference to the assignment of a judgment.

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And would not notice of the transfer of one be much more important to the rights of third parties than the other. Take, for instance, the case of *Dearle vs. Hall*, where the annuity transferred was created upon real estate, and the legal holder merely a trustee holding for the use and benefit of the *cestui que trust*, and bound to appropriate according to the directions of the beneficiary. He would, therefore, be the proper person to go to for information in regard to the property, for which the beneficiary could not be relied on. But how different is the case of a judgment. The judgment debtor usually has but little to do with his creditor, and in the ordinary transactions of life, would be the last person a man would go to for information in regard to the transfer of a judgment. The sheriff usually manages the collection; the money is paid to him, he satisfies the execution and pays over the money to the proper person, the judgment debtor having no control over the appropriation or disposition of the money, and it seems, therefore, upon principle, if notice were required to be given to any one, it should be given to the sheriff. It has been assigned as the reason of notice being required to be given to the debtor, in cases of the transfer of debts, that such system is equivalent to delivery; that the debt is thereby placed beyond the assignor's control, the debtor from the time of the notice becoming a trustee for the assignor. 9 Ves. Rep., 408. But is this the case in regard to a judgment debtor? Suppose A transfer a judgment to B, who thereupon notifies C, the judgment debtor of the assignment, is not C still bound to pay the money to the sheriff who has the execution, and when paid can he direct the sheriff to whom he

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shall pay the money, or will he be responsible in any manner for its appropriation? Certainly he would not; and then would it not be idle, in such a case, to require notice to be given to the judgment debtor?

3. The proceedings before the justice of the peace were void and consequently created no lien upon the fund in controversy. A judgment of the circuit court cannot be subjected to the payment of the judgment creditor's debts, by merely bringing the judgment debtor before the justice of the peace as a garnishee. It can only be done by attachment in the chancery court, where all the parties can be brought before the court, and when the judgment of the court may be perpetually enjoined. Any other practice would be inconvenient and in many cases oppressive to judgment debtors. The magistrates, upon giving judgment against a garnishee in such a case, could not enjoin the collection of the execution from the circuit court, and consequently the garnishee might be compelled to pay both judgments, or at least be compelled to incur the trouble and expense of a chancery suit to relieve himself from liability on both judgments. Such a practice was never contemplated by the Legislature. The act of 1843, ch. 65, § 1, would seem to be a legislative construction of the law upon this subject. That law provides for cases, where the original judgment against a garnishee was rendered by a justice of the peace, but makes no provision for cases where the original judgment was in the circuit court, which is an implied denial of the right of garnishment in such cases. For the above reasons, I think the money in controversy should be decreed to Langley and Smiley.

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W. F. COOPER, for Herman Cox administrator.

1. Upon reading Gilman's own deposition in this case, taken by Langley, it is difficult to resist the conclusion that the pretended transfer to Langley of the judgment against Clodfelter, was merely colorable, and intended to hinder and delay Gilman's creditors.

2. Be this as it may, the proof satisfactorily establishes that the garnishments were served upon Clodfelter, and judgments rendered thereon, before Clodfelter had any notice of the supposed assignments to Langley. Clodfelter is a perfectly disinterested witness, having paid the money into court before his deposition was taken, and swears distinctly and unequivocally that he never heard of said assignment until about the first of September after the judgment was rendered against him. Gilman's testimony upon re-examination, was manifestly made up to cover the case. He is interested in feeling, if not to such an extent as to render him incompetent as a witness, at least so far as to induce the court to take his statements with some grains of allowance. And his previous deposition is not such as to give him a commanding *status* in court. Besides, the conversation with Clodfelter, admitting that it actually occurred as stated, was not intended as a notice to Clodfelter, but a mere casual remark made in the course of a conversation upon a different subject. If the courts require notice of an assignment to be given to a debtor, it must be a formal notice, coming from the assignee, and intended as such to perfect his right to the *chose* assigned, and to put the debtor upon his guard. That the assignment of a *chose in action* is only perfected by notice to the



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debtor, and that a subsequent assignee with notice will be preferred to a prior assignee without notice may now be considered the settled doctrine of this court. Having twice before argued this very question before this court, it is scarcely necessary, I presume, to do more than refer to the adjudged cases. *Marshall vs. Fields*, decided at the December term, 1850, and *T. L. McGee et als. vs. Nelson et als.*, decided at the December term, 1851. In the last of these cases, the decree in which is filed with this brief, the very point raised in this case, is expressly decided. That was the case of a contest between a creditor attaching a debt due by decree of the court of chancery, and an assignee claiming the same by previous assignment in trust, and duly registered, but of which no actual notice had been brought home to the debtor. The court held that the attaching creditor was entitled to be first satisfied.

McKINNEY, J., delivered the opinion of the court.

This was a bill of interpleader. The case as presented by the pleadings and proof, is briefly this. On the second day of June, 1852, one Gilman recovered a judgment in the circuit court of Davidson, against the complainant for the sum of \$467 68. Instantly, upon the verdict being announced, and perhaps before the jury had retired from the box, Gilman, by a writing under seal, assigned and transferred the said recovery and judgment to the defendant Langley, for the indemnity of himself and one Smiley, as the endorsers of Gilman on a note for \$500, which liability was incurred upon the faith of an assurance that such an assignment would be

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made when judgment was recovered. This assignment was spread upon the minutes of the court, but no notice of the assignment was given to the judgment debtor.

On the same day, and very shortly after the foregoing assignment was made, the defendant Cox, as administrator of one Tooney, with the view of obtaining satisfaction of judgments recovered against Gilman, before a justice of the peace of Davidson, on the seventh of February, 1852, one for \$201 43, and the other for \$202 23, caused a garnishment to be served upon the complainant, summoning him to appear before the justice on the same day, at the hour of 2 o'clock. In obedience to this process, Clodfelter, the complainant, appeared before said justice, who rendered judgment against him as garnishee, for the amount of said two judgments with interest and costs. These judgments against the garnishee were stayed by him for the period of eight months. Before the expiration of the stay of execution upon the justice's judgments against the complainant as garnishee, an execution issued against him upon the circuit court judgment, for the full amount thereof, which was levied upon his property, and thereupon, he brought this bill of interpleader, offering to pay the money into court, and praying the court for his safety, to decree to which of said parties the same properly belonged. The chancellor held that the right of Langley was not perfected, on the ground of want of notice of the assignment to the debtor, and decreed that the money should be applied to the satisfaction of the justice's judgments on the garnishment.

1. If there were no other question in the case than that upon which the chancellor based his decree, we

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should hold that his conclusion was correct. There is an irreconcilable conflict of authority upon this subject. The weight of American authority seems to be, that the assignment of a *chose in action* is complete in itself, and vests a perfect title in the assignee, as against third persons, without notice of the assignment to the debtor. But the contrary of this, is the settled doctrine of the English, as well as of some of the courts of this country, at the present day. The latter we consider as the more reasonable and safe practical rule, and have accordingly held, on more than one occasion, that the assignment of a *chose in action* is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor; and this not only as regards the debtor, but likewise as to third persons. And, therefore, as between successive purchasers or assignees of a *chose in action*, he is entitled to preference who first gives notice to the debtor, although his assignment be subsequent to that of the other. To perfect the assignment not merely as against the debtor, but also as against creditors and subsequent *bona fide* purchasers, notice must be given. Hence it follows, that an attachment by a creditor, in the period intervening between the assignment and the notice, will have preference.

This doctrine furnishes a definite rule for determining between opposing equities; and places the rights of the assignee of a *chose in action* upon a footing of security altogether unattainable under the opposite rule. See the cases English and American. *White & Tudor's Leading Cases*, vol. 2. part 2, 209 to 240.

2. But another question is presented. Can the proceedings by garnishment be maintained in a case like

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the present? We are aware of no decision upon this question; but it seems to us that upon no sound exposition of our statutory proceedings upon this subject, can the remedy by garnishment be held applicable to a case like the present.

It is true, that neither in the act of 1815, nor in any other of the statutes relating to this mode of proceeding, is there any distinction made as to the character of the debts liable to be reached by garnishment. But there would be a palpable incongruity in giving such a construction to these statutory regulations, as would subject a debtor, whose liability has been already ascertained and fixed by the judgment of a court of record, to a second judgment for the same indebtedness, before a tribunal so constituted as, (all other objections aside) to possess no power by injunction, or in any other mode, of protecting such debtor from his existing liability upon the previous judgment in court, and thus leaving him exposed to executions upon both judgments. The act of 1843, ch. 65, provides a remedy against this mischief, so far as relates to judgments rendered before a justice of the peace, but it goes no further. It cannot well be supposed, that the Legislature intended that the solemn judgments of courts of record should be embraced in this proceeding by garnishment before justices of the peace, and we are not inclined to go in advance of legislation, in extending their jurisdiction in any case.

In cases like the present, the jurisdiction of a court of equity is equally ample and well established; there is the less reason, therefore, for a forced construction of our garnishment laws, in order to support the jurisdiction of justices in such cases. To this length we are not

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at present prepared to go. The force of this reasoning is not lessened, because the garnishee debtor may be protected by a bill in equity, or *supersedeas* in the court of law; it is unjust to him, to subject him to the necessity of this expense and trouble, when the mischief can be altogether avoided by the usual mode of proceeding in the proper forum.

In this view the decree is erroneous, and will be reversed.

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G. M. STEELE vs. S. M. McELROY, et al.

COVENANT. *Where one covenants in his own name, stating it to be for another.*

*Right of action.* If a person covenant in his own name, he is personally bound, though he state it to be in a representative character, as executor, guardian, trustee, committee, agent or otherwise. Thus, where persons representing themselves as a committee on behalf of a Masonic Lodge, contract in the name of said lodge, with a mechanic for the building of a lodge room, and in a covenant obligate themselves for the payment of the price, they alone are liable to and can maintain an action on said covenant.

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FROM LINCOLN.

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This was an action of covenant in the circuit court of Lincoln upon the instrument quoted in the opinion, brought by McElroy and others against Steele, for a failure to perform his contract as thereby required. There was verdict and judgment in the circuit court

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at the March Term, 1853, for the plaintiffs, Judge **MARCHBANKS** presiding, from which Steele appealed in error to this court.

**EWING & COOPER**, and **TURNER**, for the plaintiff in error.

**FOGG** and **BRIGHT**, for the defendants in error.

**TOTTEN, J.**, delivered the opinion of the court.

The action is covenant; there was judgment in the circuit court for plaintiffs, and the defendant, Steele, appealed in error.

The action is founded on the following instrument, to wit: "Articles of agreement between Galenus M. Steele on the one part, and Sanford M. McElroy, David S. Hobbs, A. R. David, committee for Union Chapter No. 18, and Wm. S. Southworth, S. S. Gray, Needham Koonce, committee for Jackson Lodge No. 68, witnesseth: That the said G. M. Steele agrees and binds himself to build a lodge room for said chapter and Lodge in Fayetteville, Tenn., over a new brick house to be erected by W. H. Morris, on the spot of ground where his present store house now stands; said room is to constitute the third story and highest part of said building; (the covenant then describes the building, and then proceeds,) "the room to be ready for delivery to said chapter and Lodge by the 1st day of January, 1852."

"The before named committee, on behalf of said chapter and Lodge obligate themselves to pay to said

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Galenus M. Steele on the first day of February, 1851, six hundred dollars, and at the completion and delivery of said rooms to them for the use of said chapter and lodge, in accordance with this agreement, six hundred dollars more, in full compensation for the same. The parties mutually bind themselves to each other in the penal sum of \$2,400, for the faithful performance of the contract," &c.

In witness whereof, the parties hereunto set their names and affix their seals this 30th November, 1851.

Signed, G. M. STEELE, [L. s.]

UNION CHAPTER No. 18, [L. s.]

By S. M. McELROY, }  
D. S. HOBBS, } *Committee.*  
A. R. DAVID, }

JACKSON LODGE No. 68, [L. s.]

By W. S. SOUTHWORTH, }  
L. S. GRAY, } *Committee.*  
NEEDHAM KOONCE, }

The \$600 were paid to defendant Steele in February, according to contract. The building was not completed and ready for delivery on the 1st of January, 1852, the time stipulated, but was completed some time afterwards, when the chapter and lodge refused to receive it. In the meantime this suit was instituted March 16th, 1852, in the name of the several persons comprising said committee, to recover their damages, sustained by reason of the defendant's breach of covenant. The defendant relied on an alleged agreement for an extension of time, but it was not proved to the satisfaction of the jury.

The verdict was six hundred dollars, the money which had been advanced to the defendant.

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1. It is insisted that the plaintiffs have no legal title to sue on the covenant, because it was made by them as agents for the chapter and lodge, their principals, in whom the legal right to the contract was vested, and who alone can maintain an action for the breach of it. The legal position is no doubt true, if the construction of the instrument insisted upon be true. It is a general rule that where the instrument purports on its face to be intended to be the deed of the principal, and the mode of execution of it by the agent, however irregular and informal, if not repugnant to that purport, it will be construed to be the deed of the principal, especially where the *in testimonium* clause is, that the principal has thereto affixed his seal. Story on Agency, § 153.

As to the manner of executing a sealed instrument so as to bind the principal and not the agent, no particular form is necessary. The material thing is, that it appear on the face of the instrument that it is the principal who makes the grant or incurs the obligation, which induces the contract to be made by the other party. *Wells vs. Back*, 2 East R., 142. *Hopkins vs. Mcheffey*, 11 Serg. & R., 129.

Thus in *Denning vs. Bullet*, 1 Blackford, 241, a bond which sets forth on its face that A. B., as agent for C. D., binds the said C. D. to make a title, &c., and is executed, A B. (seal) agent for C. D., is held to be the deed of the principal, because it appears in the face of the bond that the principal was to make the title. So in *Hunter vs. Miller*, 6 B. Monroe, 620, an instrument was described in the caption as "Articles of agreement, &c., between F. M. of the one part,



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and W. S. H., agent for J. J. and M. H., and was sealed W. S. H. (seal) for J. J. and M. H., but in the body of the instrument, stated that the principals were to convey," &c., it was held to be the deed of the principals. 1 Amer. Lead. Cas., 430. In each of these cases, the execution was informal, it appearing to be the seal of the agent and not of the principal, but on the face of the instrument the principal is expressly bound to make title and not the agent; but in *Hopkins vs. Meheffey*, *supra*, it is said that "the agent of an individual or corporation, covenanting under his seal, for the act of his principal, although he describe himself as contracting for and on behalf of his principal, is liable on his express covenant, whether he had the authority of the person whom he thus professes to bind or not." Vid. *Tippet vs. Walker*, 4 Mass. R., 395. Story on Agency, § 269, 273, 275.

Now, in the present case, the agreement is between the persons composing the two committees, of the one part, and the defendant, Steele, of the other part. The defendant agrees to build a lodge room of a given description, and the said committees, on behalf of said chapter and lodge, obligate themselves to pay the consideration money on completion and delivery of said lodge room to them for the use of said chapter and lodge. The agreement is not between the chapter and lodge of the one part, and the defendant of the other. The chapter and lodge do not obligate themselves to pay the consideration, but the said committees obligate themselves to pay, and there can be no doubt that they and not the chapter and lodge, were liable on the covenant to pay the consideration. The defendant could

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have no action on the covenant against the chapter and lodge, because it contains no agreement binding upon them; and so it must follow that they can maintain no action thereon against the defendant, for the covenant must create a mutual obligation.

It is true that the covenant is executed in the name of the chapter and lodge by the committee; but there is nothing on the face of the instrument purporting to bind them as principals to perform any part of the agreement, but on the contrary, it purports to bind the committees.

The words that the committees were acting "for and on behalf of said chapter and lodge," are merely descriptive of the persons on whose account the committees had entered into the contract and obligation contained in the instrument. Story on Agency, § 273. Certainly the mere mode of execution of the instrument could not bind the principals to any covenant contained in it, which does not purport to be their covenant, but is in terms the covenant of the committees. If a person covenant in his own name he is personally bound, though he state it to be in a representative character, as executor, guardian, trustee, committee, agent, or otherwise. 1 Amer. Lead. Cases, 433, and cases there cited.

We may further observe that it does not appear from the record whether the chapter and lodge were voluntary or incorporated associations; if the former, the covenant would be void as to them; if the latter, then a power under their corporate seal was necessary to authorize the committees to execute a deed or covenant in their name; and a deed made and executed

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in the name of a corporation, in virtue of a power under the corporate seal, would be binding on the corporation, the agent using his own seal, which, under the power, becomes the corporate seal for that purpose. But no such power appears in the record; if none existed, the contract was not well executed, and the corporation could only be liable in assumpsit, as upon a simple contract; and if the covenant was not obligatory on the corporation, it will not be contended that it was binding on the other party. We are of opinion that the persons composing the committees are parties to the covenant, and legally entitled to sue thereon.

2. As to the damages, the charge of his Honor the Circuit Judge, is not very distinct. It is in substance, that if the jury find for the plaintiffs, they will be entitled to "some damages," the sum to be assessed by the jury, and entitled to recover the money advanced upon the contract.

Now, the defendant having failed to construct the building by the time stipulated, and the plaintiffs having notified him that they would not accept performance after that time, and sued for a breach of the covenant, they were entitled to recover such damages as they had sustained by reason of defendant's failure to perform his part of the covenant; and if that were the value of the building, the true balance would be adjusted by considering the price to be given and the amount paid.

The verdict is for the amount paid, and we do not see from any thing in the case, how it could be more or less.

Judgment affirmed.

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Jacob Voorhies vs. Robert Dickson.

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JACOB VOORHIES vs. ROBERT DICKSON.

**MOTION.** *Judgment by, against principal on behalf of security.* It is a settled rule that the remedy by motion must be strictly pursued, and confined to the very cases stated by the statute which gives it. So, on a motion by a surety against his principal, under the act of 1809, ch. 69, for the amount of such judgment as may have been rendered against him as surety, where there are two or more principals all must be embraced in such motion or judgment. Separate judgments cannot be rendered against each in favor of the surety who has made no payments on the judgment rendered against him.

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FROM GILES.

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James McCallum recovered a judgment in the circuit court of Giles county, Judge MARTIN presiding, against Robert Dickson, on a note executed by A. G. Williamson, J. Voorhies and the said Robert Dickson. Robert Dickson signed said note as security, and had judgment over by motion at the same term only against J. Voorhies, as one of the principals. From this judgment Voorhies prosecuted a writ of error to this court.

M. S. FRIERSON and J. H. THOMAS, for Voorhies.

WALKER, for Dickson.

TOTTEN, J., delivered the opinion of the court.

The record which is before us by writ of error, shows that, in the circuit court of Giles county, Robert Dickson recovered judgment on motion, against Jacob Voorhies for \$526.50.

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Jacob Voorhies vs. Robert Dickson.

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The judgment recites that one James McCallum had recovered judgment against said Robert Dickson at the same term of said court, for the same amount, which judgment was founded upon the following note:

"Pulaski, February 2, 1852. Four months after date, we, or either of us, promise to pay James McCallum, or order, five hundred dollars, with interest from date, for value received.

A. G. WILLIAMSON,

J. VOORHIES,

ROBERT DICKSON, *surety*."

And said Dickson alleged that he executed said note as surety for said Voorhies, "which fact appeared to the court from the face of said promissory note; thereon the said judgment was rendered for the surety against the principal, for the sum above stated.

The summary remedy by motion in a case like this, is given by the act of 1809, ch. 69, which provides that when judgment is rendered against a surety in any note, bill, bond, or obligation, he may obtain judgment by motion, against the "principal obligor or obligors, or their representatives," for the amount of the judgment rendered against the surety."

It is a settled rule that the remedy by motion must be strictly construed and confined to the very cases stated by the statute which gives it. And, therefore, when the words are "the officers and his sureties shall be liable on motion," &c., all the sureties are meant, and the motion will not lie against part of them. 2 Meigs' Dig., 976. *Rice vs. Kirkman*, 3 Humph., 415. *Houston vs. Dougherty*, 4 Humph., 505.

Now, in the present case, it appears *prima facie*, that Williamson and Voorhies are principals, and Dickson

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Jacob Voorhies vs. Robert Dickson.

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the surety in said note. But his Honor, the circuit judge, assumed upon the face of the note, which is incorporated in the judgment, as the evidence on which it is founded, that Dickson was surety only for Voorhies. This is an erroneous conclusion from the facts recited. Williams is a joint promissor, and we are to presume, in the absence of proof to the contrary, that he is a principal.

The motion lies against the "principal obligor, or obligors, or their representatives." If there be more than one principal it lies against them jointly, and separate judgments cannot be rendered against such in favor of a surety who has made no payments on the judgment rendered against him.

There is no reason for a motion against one only when two or more are equally liable, as no notice is required, and no delay in the proceedings can ensue by reason of making all the principals defendants to the motion. It has been held that if one of the obligors be dead the motion will lie against the survivor or survivors. 3 Humph., 415. 4 Humph., 515. Or it may be against the survivor and the personal representative of the deceased obligor, on legal proof of his representative character; for, by the words of the statute, the representative is liable to the motion.

There being error in the judgment let it be reversed.

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J. W. Fields, *ex'r*, vs. The Creditors of A. G. Wheatley.

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J. W. FIELDS, *ex'r*, vs. THE CREDITORS OF A. G.  
WHEATLEY.

1. INSOLVENT ESTATES. *Acts of 1833, ch. 36, § 4, and 1852, ch. 283, § 12. Debts and arrearages due to the State. Construction.* By the acts of 1833, ch. 36, and 1852, ch. 283, providing for the administration of insolvent estates, priority of payment is required as to certain debts, and among others, debts and arrearages due to the State, by which is meant debts and arrearages due the Government or State in its sovereign character, as revenue, fines, forfeitures, penalties and the like. They have no reference to debts due to a corporation created for banking purposes, although the whole interest in such corporation may be in the State.
2. SAME. The statutes regulating the administration of insolvent estates were not intended, and cannot be construed to affect in the remotest degree, liens acquired in the lifetime of the deceased insolvent. They contemplate only a ratable division of the assets, which by law are subject to the satisfaction of the general creditors.

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FROM MONTGOMERY.

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This bill was filed by the complainant, J. W. Fields, as executor of the last will and testament of A. G. Wheatley deceased, against the heirs and creditors of said decedent, suggesting the insolvency of said estate, and for the administration of the assets *pro rata* among the creditors. The Bank of Tennessee held a mortgage upon certain lands of said decedent, which he held by equitable title, subject to the prior lien of the vendor, for unpaid purchase money. The Chancellor, Hon. BROMFIELD L. RIDLEY, decreed priority of payment out of the fund arising from the sale of the land to the vendor, and the balance to be applied to the bank debt. This fund not being sufficient for the payment of the bank debt the bank was allowed by the decree to share in the *pro rata* division of the

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J. W. Fields, *es'r*, vs. The Creditors of A. G. Wheatley.

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balance of the assets. It seems that the bank claimed priority of satisfaction of her debt out of the balance of the assets over all the other creditors. At the April Term, 1853, the Clerk & Master was ordered to report, among other things "what creditors were entitled to specific, or prior liens, and on what funds, and the respective sums they were entitled to, and the order of their priority." He reported among other things, that the bank was entitled to have appropriated to her debt the trust fund, after extinguishing the vendor's lien, and was further entitled to have full satisfaction of the balance of her debt out of the general fund, over all the other creditors. To this part of the report the other creditors excepted, which exception being sustained by the Chancellor, and a decree given as above, the bank appealed to this court.

KIMBLE and DUDLEY, for the complainant.

HORNBERGER, ROBB and BAILEY, for the respondents.

McKINNEY, J., delivered the opinion of the court.

This was a bill for the administration of an insolvent estate.

The only questions necessary to be noticed arise between the Bank of Tennessee and the other creditors of the estate. The bank held a mortgage on a tract of land, of which the testator was the equitable owner. The land was sold by order of the Chancellor, and the proceeds applied: 1st, to the satisfaction of the unpaid purchase money due the vendor; and, 2nd, towards the



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satisfaction of the mortgage debt due to the bank of Tennessee. But the fund being insufficient to discharge both debts, a balance of between two and three thousand dollars of the debt due to the bank remains unsatisfied.

The available assets fall short of meeting the full amount of the debts due from the estate; and, as respects the balance of the debt remaining due to the bank of Tennessee, the first question is: Whether the bank is to be regarded as standing on the same footing with the general creditors of the estate, and merely entitled with them, to a ratable division; or, whether it is entitled to be paid the full amount of its debt in preference to the other creditors?

The act of 1833, ch. 36, providing for the administration and distribution of insolvent estates, by the 4th section, gives priority to certain debts, and amongst others, to *debts and arrearages due to the State*; and a similar provision is contained in the act of 1851-2. And it is argued, that, as the Bank of Tennessee is a State institution, exclusively owned and controlled by the State, it follows that a debt due to the bank is a debt due to the State, within the meaning of the statute above referred to; and, therefore, the bank is entitled to priority over the other creditors. This argument is wholly untenable. The statute obviously refers to "debts and arrearages" due to the Government, or State, in its sovereign character, as revenue, fines, forfeitures, penalties, &c. It is clear that it has no application to corporations created for banking purposes, though the whole interest in such corporation may be in the State.

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J. W. Fields, *ex'r*, vs. The Creditors of A. G. Wheatley.

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In creating such a corporation, the State has invested it with none of its rights or prerogatives, none of its powers or incidents of sovereignty; but has, in this respect, placed it upon the same footing as other corporate bodies, and the same principles are applicable to it. In assuming to carry on the business and to exercise the functions of banking, the Government, thus far, in the language of C. J. Marshall, divests itself of its sovereign character, and takes that of a private citizen, or corporation. Hence, the corporation, though belonging exclusively to the State, is subject to be sued; is within the operation of the statute of limitations; and in the collection of its debts, can assert no priority or right over other creditors. 9 Wheaton's R., 904. 3 McCord's R., 377. 6 Alabama R., (new series,) 814. 2 Peters' R., 323. 8 Watts' R., 316.

2. Another question is made on behalf of the other creditors. For them, it is insisted, that inasmuch as the Bank of Tennessee under the lien of the mortgage, acquired in the lifetime of Wheatley, has already received, under the decree of the Chancellor made in this cause, some twenty-five hundred dollars of its debt, it ought not, for the balance of the unsatisfied debt, to be permitted to come in with the general creditors, who have received nothing, for a *pro rata* division of the residue of the funds, until at least the other creditors shall have received out of the said fund, an equal proportion of their respective debts with that received by the bank under the mortgage. This proposition is likewise wholly untenable. The statutes regulating the administration of insolvent estates, were not intended, and cannot be construed to affect, in the remotest

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degree, liens acquired in the lifetime of the deceased insolvent. They contemplate only a ratable division of the assets, which by law, are subject to the satisfaction of the general creditors.

The bank, therefore, as to the unsatisfied balance of its debts, is entitled to a *pro rata* division of the fund remaining for distribution among the general creditors. The Chancellor so held, and the decree is affirmed.

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CHARLES PUCKETT vs. THE STATE.

1. **ESCHEATS.** *Action to recover lands escheated.* By our law, upon the death of the owner of real estate intestate and without heirs, the title vests directly in the State, and an action to recover the same can only be maintained in the name of the State. So, that, although escheated property is to be appropriated to the use of common schools, and placed under the control of the board of commissioners of common schools, to be disposed of in such manner as they may deem best for the interest of the school fund, yet the legal title vesting in the State at the death of such intestate, the action cannot be maintained in their name for its recovery, but must be brought in the name of the State.
2. **SAME.** *Statute of limitations.* Seven years adverse holding of escheated lands does not vest title under the act of 1819, as the proviso to the third section of said act declares that said act shall not affect lands reserved for the use of schools.
3. **SAME.** *Widow. Act of 1850, ch. 54.* By the act of 1850, ch. 54, it is provided that hereafter when any person shall die intestate, leaving no heirs capable of inheriting, but leaving a widow, said widow shall take in fee simple all the real estate of which her said husband died seized and possessed; and the second section of said act extends its provisions to all cases

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where persons have heretofore died intestate as well as those who may hereafter die intestate; *Held*, that, to say nothing of the unconstitutional feature of the second section, it can have no application in favor of the heirs of a widow who died previous to its passage.

4. PRESUMPTION OF DEATH. *After seven years' absence.* The rule as to the presumption of the death of a person after seven years' absence, is, that such presumption of law does not attach unless it appear that such person has been absent from his domicile, or his last place of residence, without intelligence concerning him for the period of seven years. A jury, however, may find the fact of death if the circumstances concur, from the lapse of a shorter period than seven years.

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FROM WILSON.

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This was an action of ejectment in the circuit court of Wilson, instituted by W. L. Martin, attorney general of the fifth circuit, in April, 1852, in the name of the State of Tennessee, against the plaintiff in error, to recover certain lands in Wilson county, which had escheated to the State for the use of common schools. It seems that John Tubb, the original proprietor, died in 1834, leaving no heirs, but leaving a widow who survived him but a few weeks. The lands were occupied by various persons until the year 1843, when they were sold by the sheriff for taxes, and Charles Puckett, the plaintiff in error, became the purchaser. He received the sheriff's deed in 1844, and has held the lands ever since under said deed until the commencement of this action. There was verdict and judgment for the State, below, Judge DAVIDSON presiding, from which the defendant appealed in error to this court.

JORDAN STOKES for the plaintiff in error.

W. L. MARTIN, for the State.

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Charles Puckett vs. The State.

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McKINNEY, J., delivered the opinion of the court.

This was an action of ejectment, brought in the circuit court of Wilson county, for the recovery of a tract of land situate in said county, alleged to have *escheated* to the State. The demise is in the name of the State.

It appears that John Tubb died intestate in the year 1834, seized and possessed of said tract of land. The intestate left a widow, who survived him a few weeks, but no children, and according to the finding of the jury in this case, no heirs. In 1843 this tract of land was sold at execution sale for the taxes thereon, and was purchased by the plaintiff in error, at the price of four dollars and thirty cents; who, on the 16th of July, 1844, received a conveyance from the sheriff, under which he entered shortly thereafter, and continued in the uninterrupted adverse possession of the same from thence up to the commencement of this action, which was in April, 1852; more than seven years from the time of his adverse entry. The jury found in favor of the lessor of the plaintiff, and judgment was rendered accordingly; to reverse which an appeal has been taken to this court.

Several errors in law are relied upon for a reversal of the judgment:

1. It is said the action cannot be maintained in the name of the State, the legal interest in all escheated property being vested in the board of commissioners of common schools. And in support of this position we are referred to McEwen's case, 5 Humph., 241; and

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*Hinkle vs. Shadden*, 2 Swan, 46. These cases are no authority for the position assumed. Upon the death of the owner of real estate, intestate, without heirs, the title vests directly in the State by operation of law. It is true, that, being appropriated to the use of common schools, it is placed under the superintendence of the board of commissioners of common schools, and the board are empowered "to dispose of the same in such manner as they may deem best for the interest of the common school fund." But the legal title is not vested in the board; it remains in the State, and if the property be adversely held, an action for its recovery can alone be maintained in the name of the State. Such is the inevitable conclusion upon general principles. But the act of 1829, ch. 43, § 1, which is not changed by any subsequent legislation, in express terms requires that the suit in such case shall be "in the name of the State."

2. It is insisted that the action is barred by the statute of limitations of 1819. To this proposition the simple answer is, that the *proviso* to the third section of the statute expressly declares "that this act shall have no bearing on the lands reserved for the use of schools."

The case of *Sampson vs. The University of Nashville*, 2 Swan, 600, does not support the position contended for. The point in judgment in that case, and the only point decided, is, that lands held by the University under a grant from the State of Tennessee, are not lands "reserved for the use of schools," within the meaning of the *proviso*. The decision does not, nor was it intended to question the correctness of the pro-

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Charles Puckett vs. The State.

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position, that all lands appropriated by law to the use of schools, are to be considered as within the *proviso*, and consequently exempted from the operation of the statute of limitations. And by the act of 1827, ch. 64, § 1, the substance of which was incorporated into the amended constitution of 1834, (art. 11, § 10,) all escheated property is appropriated to the use of common schools.

3. But the act of 1850, ch. 54, has been referred to for the purpose of showing that the title to the land in question, is, by operation thereof, outstanding in the heirs of the widow of John Tubb. This act was passed upon a very liberal construction of the provision contained in the amended constitution, (article 11, § 11,) which confers power upon the Legislature to pass laws, "authorising heirs or distributees to receive and enjoy escheated property." The first section provides, "that hereafter when any person shall die intestate, leaving no heirs at law capable of inheriting real estate under the laws of Tennessee, but leaving a widow, then and in that case, the said widow shall be entitled in fee simple, to all the real estate of which her said husband died, seized and possessed," &c. The second section declares, "that the provisions of this act shall be extended to and embrace all cases in which persons may have heretofore died intestate, as mentioned in the first section of this act, as well as those who may hereafter die intestate; and for the recovery of such real estate suits have not been brought, or, if brought, have not been determined."

Whether or not the provisions of either of the foregoing sections are subject to constitutional objections,

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Charles Puckett *vs.* The State.

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is a question not presented for our consideration in the present case. Admitting the retrospective feature of the second section to be unobjectionable, it is very clear that it can apply only in favor of widows who were living at the time of the passage of the act, and that it can have no application in favor of the heirs of a widow, who, as in the present case, died previously.

4. The rule as to the presumption of the death of a person after seven years' absence, was not correctly stated in the charge of the Court. This presumption of law, independent of the verdict of the jury upon the facts, does not attach, unless it appear that the person has been absent from his domicil, or last place of residence, without intelligence concerning him for the period of seven years. Though a jury may find the fact of death, if the circumstances of the case concur, from the lapse of a shorter period than seven years.

But the error in this respect, was obviated by other portions of the charge.

Let the judgment be affirmed.



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John L. Grissom vs. Alexander Moore.

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## JOHN L. GRISSOM vs. ALEXANDER MOORE.

SECURITY AND ENDORSER. *Act of 1843, ch. 32.* A security or endorser cannot avail himself of the provisions of the act of 1843, ch. 32, unless the fact of his being such security or endorser, appears upon the face of the judgment and execution against him. If the provisions of said act are not complied with in this respect, all the defendants in an execution are to be treated as principals. Vide 11 Humph., 445.

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FROM WHITE.

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This cause originated before a justice of the peace in White county, in a suit in trespass, brought by Grissom against Moore, a constable, for compelling said Grissom to pay an execution issued jointly against one Wood and Grissom. It seems that Grissom was security for Wood in a note, upon which judgment was obtained and execution issued, but the fact of suretyship did not appear either in the judgment or execution. The constable, Moore, however, was informed by Grissom and others of the relation of the parties when the execution was placed in his hands; but notwithstanding this information, did not molest Wood, but levied the execution upon the property of Grissom, who gave a delivery bond and afterwards paid to Moore the amount. This action was thereupon instituted by Grissom against Moore, and brought by appeal into the circuit court of White, where there was verdict and judgment for Moore, (Judge GOODALL presiding,) from which Grissom appealed in error to this court.

GARDENHIRE and MURRY for the plaintiff in error.

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John L. Grissom vs. Alexander Moore.

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S. TURNNEY for the defendant in error.

McKINNEY, J., delivered the opinion of the court.

This suit was commenced before a justice of the peace of White county to recover back money paid under the coercion of legal process. The facts are these: On the 8th of October, 1851, one W. L. Wood, and Grissom, the plaintiff, jointly confessed judgment in favor of John Witt, before a justice, for \$25.15, upon a bill single executed by Wood and Grissom. Execution upon this judgment was "stayed" by one Denton at the instance and request of Wood alone, as is alleged, Grissom not joining in procuring the stay. After the expiration of the stay, execution issued, and was satisfied out of the property of plaintiff, Grissom, by the defendant, Moore, the constable in whose hands the process was placed. To recover back the amount thus collected, is the object of the present suit. The plaintiff failed to recover in the circuit court, and has brought the case here by an appeal in error.

The ground of recovery is, that Grissom was merely the surety of Wood in the bill single on which said judgment was confessed, and that as execution was stayed without his procurement, he was not, by the act of 1842, ch. 136, § 1, liable upon said judgment, unless the principal and stayor had both become insolvent, which, in the present case, was not the fact, so far at least as respects the stayor, and that he protested against his liability, to the defendant, before the levy by him of the execution, but the defendant, with full knowledge of the facts, persisted in the wrongful levy

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John L. Grissom vs. Alexander Moore.

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and sale of plaintiff's property. The relation of principal and surety does not appear upon the face of the bill single, upon which Wood and Grissom confessed the judgment before mentioned; nor is the fact that Grissom was but the surety of Wood, in said bill single, recited either in the magistrate's judgment, or in the execution under which the defendant Moore made the levy. Upon this ground alone, his Honor the circuit Judge, instructed the jury that the plaintiff could maintain this suit.

This instruction is supposed to be erroneous. We do not think so; and as no other question is raised in the argument here, we will consider only the point made in the charge. The act of 1843, ch. 32, introduced a material change of the law upon this subject. The first section provides that in all judgments rendered in any court of record, or by any justice of the peace, "against a principal and security, or securities," it shall be the duty of the sheriff or other officer having the collection of such judgment, to exhaust all the property in his county liable to execution, both real and personal, of the principal, before he shall be at liberty to proceed against the property of any security, endorser, or stayor. But it is provided by the second section, that before any security, or endorser shall be entitled to the benefit of this act, he shall make it appear to the court or justice trying the cause, that he is in fact, only a surety or endorser; and this fact shall be recited in the judgment and execution; and justices of the peace, where executions shall have been stayed, shall also recite the fact, and the name of the stayor in the execution. The officer being thus per-

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John L. Grissom vs. Alexander Moore.

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emptorily required, at his peril, first, to exhaust the property of the principal debtor, the provision is a wise and proper one, that the judgment and execution shall furnish upon their face incontrovertible evidence of the relation of the parties. This provision was designed to preclude all inquiry, after judgment, into the antecedent relation of the defendants, and to cut off all subsequent litigation upon collateral issues upon their prior relations. The consequence is, that if the requirement of the second section of the act has not been observed, the defendants are all to be treated as principals, and neither can resort to any matter in avoidance of liability upon the judgment and execution, growing out of the former relation as surety, or endorser.

We do not hold that the provision of the act of 1842, ch. 136, § 1, which exonerated a "security or endorser" who has not joined in procuring a stay of execution, unless the principal debtor and stayor shall both become insolvent, is repealed by the act of 1843, ch. 32. We merely assert that the surety or endorser is precluded from availing himself of the provision of the first mentioned act, unless the fact of his being surety or endorser, shall be made to appear upon the face of the judgment and execution, as required by the latter act. 11 Humph, 445.

Judgment affirmed.

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A. M. Savage, *adm'r vs. Hale & Coggin*.

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A. M. SAVAGE *adm'r vs. HALE & COGGIN*.

1. GUARDIAN AND WARD. *Slaves. Act of 1827, ch. 61. Administrator.* By the act of 1827, ch. 61, the title to slaves belonging to the estates of persons dying intestate passes to the distributees, subject to the claims of the administrator to pay debts. It is his duty to take charge of them, and if there be no debts to distribute them. If there be no administration, and the distributees be infants, it is the duty of their guardian to take charge of the slaves and hire them out, and in so doing he is not a wrongdoer, but holds them rightfully.
2. SAME. *Rights and Liabilities of Guardian.* Where a guardian in the absence of administration, takes charge of the slaves of his ward, and by his negligence one of the slaves is lost, an administrator appointed afterwards, cannot recover the value of said slave in an action against said guardian. The liability of such guardian is to his ward alone. In such case the right of the administrator to recover against the guardian, would only extend to slaves of the estate then living, and which he could show were necessary for the payment of debts.

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FROM DE KALB.

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This action of trover was submitted to a jury of DeKalb county, at the April Term, 1853, of the circuit court of said county, before Judge GOODALL. There was verdict and judgment for the defendants, from which the plaintiff appealed. The material facts are recited in the opinion of the court.

SAVAGE, MEIGS and BRIEN, for the plaintiff in error.

JORDAN STOKES, FITE and CANTRELL, for the defendant.

CARUTHERS, J., delivered the opinion of the court.

Joseph Crowder died in Virginia, 14th of February, 1843, intestate, leaving a widow and five infant children,

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A. M. Savage, *adm'r* vs. Hale & Coggin.

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and three slaves, Rose, Elizabeth and Susan. No administrator was appointed in Virginia, and there were no debts. The widow came to this State with the children and slaves. In 1849 she filed a bill in the chancery court at Carthage, as guardian of her children, praying for leave to sell Susan and vest the proceeds in a tract of land. Pending this application, the widow resigned her guardianship, and defendant Coggin was appointed guardian on the 7th of January, 1850. At the February Term, 1850, of said chancery court, a decree was made to sell Susan at the minimum of three hundred and seventy-five dollars, which after paying cost, was to be vested in the said land. The decree does not appear to have been executed, but the record was read as evidence on the trial of this suit. Coggin as guardian, hired the slave Susan to the defendant Hale, and she died in his possession during the time for which she was hired. At the January Term, 1852, of the county court of DeKalb, the plaintiff took out letters of administration on the estate of Joseph Crowder, and on the sixth day of the same month, brought this suit to recover the value of the girl Susan.

The court charged the law in reference to the issues, to be, that if the defendants come to the possession of the negro with the approbation and consent of Mrs. Crowder, and as guardian of Crowder's children, and showed by proof that the death was not the result of any wrong or negligence of theirs or either of them, but that they bestowed such care and attention on her health as a prudent and humane man would exercise, they would not be liable. The jury found for the defendants.

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A. M. Savage, adm'r vs. Hale & Coggin.

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The pleas as well as the charge, probably place the defense on the wrong ground, being that of bailor and bailee, but any error that may exist in this, cannot in our view of the case, be injurious to the plaintiff, and does not affect the correctness of the verdict and judgment against him. Since the act of 1827, ch. 61, Car. & Nich., 82, the title to slaves does not pass to the personal representative, as before that act was the case as to all personal property, but to the distributees, as land goes to the heirs on the death of their ancestor, with no other exception but that the administrator is bound to take possession of them, and if not required to pay debts to distribute them. He has no power of disposition even for the payment of debts or for distribution, but by decree of court. If then the title passes to the distributees who are infants, and there is no administrator to take possession of slaves, it is the duty of their guardian to take charge of them, and hire them out, and he is not a wrongdoer but holds them rightfully. To be sure they are held subject to the claim of an administrator, if one should be appointed afterwards, and need them for the payment of debts. It would be absurd to hold, since the title goes to the distributees, subject only to the payment of the debts of the intestate, or to the right of the administrator for that purpose, that the latter could recover them from the rightful owners, when it is shown as in this case that there are no debts.

The guardian then in the case before us, was not an executor *de son tort*, nor was he guilty of a conversion in hiring the slave to his co-defendant Hale, but was acting in the discharge of his duty as guardian. He is not answerable to the plaintiff even for neglect of duty,

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A. M. Savage, *adm'r vs. Hale & Coggin.*

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but only to his wards. The plaintiff's right to recover as administrator against the guardian, would only extend to slaves of the estate then living, and which he could show were necessary for the payment of debts. But in this case the only question presented is, whether the guardian is liable to the administrator under the circumstances here presented, for the value of the slave which has died, as a wrongdoer, and to this question alone we confine our decision.

It is assumed in the argument, that the hire of slaves is not assets, because they go to the widow and heirs who take them subject only to the debts of the deceased, just as the heirs take the land; that it is a conversion by the administrator to hire them out, and that an executor in his own wrong can be in no better condition, but must certainly be liable for an act of ownership amounting to a conversion even in a rightful representative. If the first position of the argument were conceded, the conclusion would not follow, because we hold that Coggin is not an executor of his own wrong, but that his possession was rightful and proper, and that his functions as guardian imposed upon him the right and duty of hiring out the slaves of his wards.

So in every view of this question, which we have been able to take, we are brought to the conclusion that the plaintiff cannot recover.

Let the judgment be affirmed.



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 Robert Hallum vs. Patrick Yourie.
 

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## ROBERT HALLUM vs. PATRICK YOURIE.

1. SLAVE. *Gift of life estate, reserving remainder by parol. Act of 1831, ch. 90.* A valid estate in remainder in a slave could not be reserved in parol by the donor of the life estate, even before the passage of the act of 1831, ch. 90. Such an estate being invalid the whole interest would pass by the gift to the donee.
2. REMAINDER. *In chattel, dependant on life estate. Reserved by deed. Rule at common law.* By the rule at common law, a reservation in remainder of a chattel dependant on a life estate was admitted with much doubt and difficulty, even when created by deed or will, and this doctrine, it seems, has never been extended so as to embrace the case of a parol remainder. There is no difference on principle between the cases of a parol gift and a parol reservation of a remainder in a chattel; in neither case does possession follow the subject matter disposed of, and they are alike subject to the objection of a disjunction of the possession from the property, without written evidence fixing the title.
3. LOAN. *Rule as to loans at common law.* The rule of the civil law as to the distinction between precarious and definite loans does not obtain at common law. All pure loans, whether for a definite or indefinite period, are, at common law, generally regarded as tenancies at will, and subject to be revoked at any time by the will of the loanor, or their character subject to be changed by marriage in the case of a female loanee, if accompanied with a sufficient subsequent adverse holding on the part of her husband, which is known to the loanor.

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 FROM SUMNER.
 

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Hallum, the plaintiff, instituted this action of detinue against Yourie in the circuit court of Sumner, to recover certain slaves, *Eliza* and her increase, which he claimed by parol gift and delivery to his wife, made by Celia Harris, her aunt, in the year 1826, and which, he alleges, were loaned, "or given" by him and his wife to the said Celia Harris, during her life, to be reclaimed by him at her death. Celia Harris was then the widow of John Harris. In 1827, she being in the possession of said slaves, intermarried with the defend-

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ant, Patrick Yourie, who has held said slaves adversely as his own ever since, which was known to the plaintiff. In 1850, Celia Yourie, (formerly Celia Harris,) died, and soon afterward this suit was instituted to recover the slaves. The proof as to the gift is so conflicting that it cannot be stated with any degree of accuracy. The declarations of the donor are relied upon by both parties to prove and disprove the gift. There was verdict and judgment in the court below, Judge BAXTER presiding, for the defendant; from which the plaintiff, (his motion for a new trial and in arrest of judgment, being refused,) appealed to this court.

JORDAN STOKES and BARRY, for the plaintiff.

GUILD and HEAD, for the defendant.

ANDREW EWING, Special J., delivered the opinion of the court.

This is an action of detinue, instituted in the circuit court of Sumner county, to recover certain slaves alleged to be the property of the plaintiff. It appears from the bill of exceptions, that in the year 1826, John Harris died intestate in Wilson county, the owner of a negro girl, *Eliza*; and soon after his death, his widow, Celia Harris, and the plaintiff, Robert Hallum, qualified as his administrators on his estate, and sold the girl *Eliza*, to the widow. There is some proof in the record, tending to show that during the same year Celia Harris made a gift of this negro to her uncle, the said Robert Hallum, and that he shortly afterwards made a

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gift of the life estate to her, reserving to himself the remainder in the slave. There is other evidence indicating that it was a loan to her of the negro during her life, and then to be returned to Hallum. We may remark that the whole proof on this subject is vague and unsatisfactory, and that it is very difficult, from the testimony, to give a proper statement of these transactions between Mrs. Harris and Hallum. It is certain however, that the slave was re-delivered to Mrs. Harris, and in the year 1827 she intermarried with the defendant, Yourie, who took possession of the negro, and has held her and her increase ever since, claiming and using them as her own, adversely to the right of the plaintiff, and most probably with his full knowledge of the fact. Mrs. Yourie died in 1850, and this suit was brought soon afterwards for the recovery of *Eliza* and her increase.

Numerous questions of exception to the evidence and charge of the circuit judge have been argued and presented for adjudication, but as we have based our decision on two points, which will be decisive of the case, it is deemed unnecessary to advert to the others.

The circuit judge charged the jury amongst other things, as follows:

"It is next insisted, that if the plaintiff ever had a title to the slave that he gave her to Mrs. Harris during her life, and that such gift being verbal and accompanied by delivery, passed the absolute title to Mrs. Harris. I do not think that is law. If you believe that in 1826 Hallum gave or loaned the slave to Mrs. Harris for her life, and delivered to her the possession, so long as Mrs. Harris continued to hold

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the slave in subordination to Hallum's title, and to use her in the manner contemplated by the gift, or loan, Hallum had no power to retake the gift, or loan, and consequently no length of time would operate to bar his recovery at the death of Mrs. Harris. But, if the proof shows what is insisted for by the defendant, that the gift or loan was made in 1826, that Mrs. Harris intermarried with Yourie in 1827, and that upon said marriage defendant took possession of the slave in his own right and as his absolute property, that from thence hitherto he has continued to hold said slave and her increase adversely to Hallum and every body else, and that this adverse holding has been open, notorious and public, with the knowledge of Hallum all the time, such adverse holding, for such length of time, would operate as a bar to Hallum's right of recovery. Notice to Hallum of the adverse holding of Yourie may be proved as any other fact, by direct and positive, or circumstantial proof."

The jury found a verdict for defendant. The court refused a new trial, and the plaintiff prosecutes his appeal in error to this court.

(We cannot assent to the correctness of the statement, that previous to our act of 1831, ch. 90, a valid estate in remainder in a slave could be reserved in parol by the donor of the life estate. We have been referred by the counsel for the plaintiff to no authorities in support of such a position, and our own examination has satisfied us that such an estate would be invalid, and that the whole interest would pass by the gift to the donee.) It is decided in the case of *Payne vs. Lassiter*, 10 Yerger, 510, that a parol gift of the

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remainder in a slave, previous to our act of 1831, was void; and the court say in that case, "that, by the rule of the common law a reservation in remainder of a chattel dependant on a life estate, was admitted with much doubt and difficulty, even when created by will or deed, and that such reservation was first decided to be valid in Manning's case; 8 Coke, 95." We think the true history of the law on this subject is here given, and we have found no subsequent case, either in England or America, where this doctrine has been extended so as to embrace the case of a parol remainder.) We do not perceive on principle, the difference between the cases of a parol gift and a parol reservation of a remainder in a chattel; in neither case does possession follow the subject matter disposed of, and they are alike subject to the objection of a disjunction of the possession from the property, without written evidence, establishing the title, leaving it to be litigated between the parties, at the distance of thirty or forty years from the time of the gift, and the result dependent upon the frail memory of persons who were uninterested at the time, in remembering the nature and character of the transaction. Our views on this branch of the case are supported by decisions in courts of North and South Carolina, as we find them reported in 3 Murphy, p., 493; and 9 Bunard, 411, and we are aware of no conflicting authority.)

(We agree with the circuit judge, in holding that a parol loan of the use of a slave for life, or any other shorter period, would be valid; and so long as the property was held in subordination to the title by the loan, no bar of the statute of limitations could be

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interposed to prevent the recovery by the loanor of his property; and we hold further, that he was correct in saying, that, "if Mrs. Harris intermarried with Yourie in 1826, and Yourie thereupon took possession of the slave, claiming her in his own right, adversely to the right of Hallum, and this claim and possession have been continued ever since, open, public and notorious, with the knowledge of Hallum all the time, then the right of the plaintiff would be barred, and the notice to Hallum might be proved as any other fact, by direct and positive, or circumstantial evidence."

Whatever may be the distinction in the civil law, between precarious and definite loans, no such rule obtains under the common law; and all pure loans, under our system, whether for a definite or indefinite period, are generally regarded as tenancies at will, and subject to be revoked at any time by the will of the donor, or their character to be changed by marriage, in the case of a female loanee, if accompanied with a subsequent adverse holding on the part of her husband, which is known to the loanor. See Story on Bailments, 253, 258, 277.

It is insisted by the counsel for the plaintiff, that such is not the rule established in Tennessee, and we are referred for authority to 2 Yerger, p. 74. The facts of that case are, that a father, on the marriage of his daughter, placed a slave with his son-in-law, with the agreement that he was to be retained until replaced by the gift of a negro girl. The slave remained in possession of the son-in-law some three years, and then the father-in-law sent the negro girl, but neglected to retake possession of the first slave, and after

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five years the creditors of the son-in-law sought to subject the first negro sent to the payment of his debts. The court held that the loan contemplated in our act of 1801, ch. 25, § 2, as fraudulent, is a loan for an indefinite period, and therefore did not embrace the case then before them. We may remark: 1st, that this decision only gives a construction to the words used in a very stringent but salutary state of frauds; a statute that converts neglect and delay into a positive presumption of fraud, and thus without his consent, divests a loanor of his property. The court might well regard the legislature as not intending to make loans for a definite period, *evidence of fraud*, under such a statute, but they do not say, or even intimate an intention of changing the general rule of the common law as to pure loans. Furthermore, the loan in that case is placed on the footing of a contract, as it was somewhat in the nature of an advancement, and therefore has no relevancy to the decision as to the rights of the loanor and loanee in the case of a stranger. We at least, are not disposed to regard the authority of that case, as in conflict with the views we have expressed.

The rule established in North Carolina, between bailor and bailee of slaves, as to the necessity of redelivery of possession by the bailee, or the proof of direct and positive notice to the bailor, of adverse holding, before the statute of limitations could be interposed as a bar to the recovery of the bailor, has never been admitted by our courts, and the rule of our State is correctly stated in *Turner vs. Granger*, 5 Humph., 347, and numerous other cases.

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It follows, from the proposition we have stated, that the charge of the circuit judge was not erroneous against the plaintiff, and therefore the judgment of the circuit court is affirmed.

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WILLIAM BATES vs. ALLEN WATSON.

1. BETTING ON ELECTIONS. *Action to recover money loaned to be bet on an election.* Money lent and applied by the borrower for the express purpose of accomplishing an illegal object, cannot be recovered, and the test whether a demand connected with an illegal transaction can be enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his claim.
2. ILLEGAL CONTRACT. *Subsequent promise based upon or growing out of same.* A new contract may be created, which, if wholly unconnected with the illegal transaction, and founded on a new consideration, will be valid, although in relation to a matter respecting which there may have been prior unlawful transactions between the parties; but if such contract, though it purports to be new, grow immediately out of, or be connected with the illegal transaction, it will be utterly void.
3. SAME. *Same. Moral obligation.* Where a party had loaned money to be bet on an election, and upon which the loanee accordingly bet upon such election, and afterwards promised to repay the same, and the loanor brings his action upon the subsequent promise, to recover the same, it is not sufficient to prove such promise, but it must be shown that it was based upon a new and sufficient consideration. It is now well established that a moral obligation is not a sufficient consideration to support such promise.

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FROM DE KALE.

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This action of assumpsit was brought by Watson against Bates in the circuit court of DeKalb, to recover



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a sum of money loaned to bet on the presidential election of 1848. It seems that Bates lost the amount, and it was paid over to the winning party, and subsequently promised Watson to repay the same. There is some proof tending to show a partnership between the parties in the bet, and other proof showing that Bates was alone interested therein. There was a verdict and judgment for Watson in the court below, from which Bates appealed in error to this court. The portion of Judge Goodall's charge excepted to, is sufficiently quoted in the opinion, which embodies also a sufficient recital of the facts.

PICKETT, FITE, SAVAGE and TURNEY for the plaintiff in error.

JORDAN STOKES and M. M. BRIEN for the defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of assumpsit in the circuit court of DeKalb, brought by Watson against Bates. The plaintiff recovered judgment for \$442, and to reverse this judgment an appeal in error has been prosecuted to this court.

The material facts of the case are these: During the pendency of the Presidential election in 1848, Bates made a wager with one Lancaster on the result of the election. Each party deposited in the hands of the stakeholder \$400 in money, and \$154 in cash notes. Watson furnished the whole of the money and notes

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staked by Bates, and there is evidence tending to establish pretty fully, an agreement between them to be jointly interested in the wager, but the name of Watson was not to be used, in order that there might be "but one fine if they were indicted." Upon the result of the election being ascertained, the stakeholder paid over the deposit to Lancaster, the winner. Subsequently to the loss of the wager, and payment of the deposit to the winner, conversations are proved between Watson and Bates to the effect that the former claimed that Bates was indebted to him for the amount of the money and notes lost upon the wager, and that Bates admitted such indebtedness, and promised to pay, and his failure to do so constitutes the foundation of the present action. The error relied upon is in the charge of the court to the jury; the portion of the charge excepted to, if we understand it correctly, assumes that if Watson (who furnished the whole amount of the deposite made by Bates,) was jointly interested in the wager, and Bates, after the result of the election was ascertained, directed or concurred in the delivery of the deposite to the winner, by the stakeholder, and, after doing so, admitted his indebtedness to Watson, "on account of the money so paid over at his instance, and agreed, in consideration thereof, to pay it, then, to the extent of Bates' interest in the wager, thus discharged with the money of Watson, at the instance of Bates, he, Bates, would be bound to Watson."

This charge is somewhat obscure and confused, but we suppose the meaning is, that inasmuch as the money paid over by the stakeholder, in discharge of Bates' part of the loss, was to be regarded as the money of

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Watson, and having been paid over after the wager was determined, by the express or implied direction of Bates, the subsequent promise by him would amount to a new contract. If this be a correct exposition of the charge, it involves at least two errors. 1. In such an illegal transaction there can exist no legal privity or relation between the parties. *Wood vs. Owen*, 2 Swan's Rep., 146. The transaction, therefore, upon the proof in this record, must be viewed as simply a loan by Watson to Bates for the express purpose of being applied to an illegal object, and the money deposited to the extent of Bates' interest in the matter, must be treated as his money. 2. There was no new consideration to support the subsequent promise; the promise can only be referred to the original illegal consideration.

It is admitted that money lent, and applied by the borrower for the express purpose of accomplishing an illegal object, cannot be recovered. And the test whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires any aid from the illegal transaction to establish his case. *Chitty on Con.*, (edition of 1848) 657.

We take it to be a principle of law, too well established to be now called in question, that no liability can be created by a subsequent promise, where no legal obligation ever existed previously, unless supported by a new and sufficient consideration.

It is unquestionably true that a new contract may be created, which, if wholly unconnected with the illegal transaction and founded on a new consideration, will be valid, although in relation to a matter respecting

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which there may have been prior unlawful transactions between parties. 11 Wharton's Rep., 207. But if the promise, though it purports to be a new contract, grow immediately out of or be connected with the illegal transaction, it will be utterly void. And it is not enough to show merely an express subsequent promise; there must be some new consideration, legally sufficient in itself, to support such promise.

Indeed, it seems to be now established, notwithstanding previous decisions to the contrary, that even a moral obligation is not a sufficient consideration to support a subsequent promise. See note to *Wennal vs. Adney*, 3 B. & V., 249, 11 Ad. & E., 438, 8 Queen's B. Rep., 483, 3 Pick. R., 207, 9 Watts, 396. In the present case there is not the color of a new consideration. The subsequent promise can have no other support than the original loan, and that being illegal, no court of justice will lend its aid to give effect to such promise.

The plaintiff's action must therefore fail. Let the judgment be reversed and a new trial granted.

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Otis Pettee vs. Tenn. Manufacturing Co.

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## OTIS PETTEE vs. THE TENN. MANUFACTURING CO.

1. **CONTRACT.** *Claim of recoupment of damages when available.* To entitle a defendant when sued upon his contract, to a reduction of the plaintiffs recovery in the way of recoupment of damages for the partial failure of the plaintiff to perform his contract, the damages he claims must be capable of computation with reasonable certainty and precision, and such as he might recover in a cross action against the plaintiff.
2. **SAME.** *Same. Illustration of the rule.* To subject mere speculative profits and losses of interest upon capital, when claimed by the defendant in recoupment, to the operation of the rule, they should be shown to have been within the contemplation of the parties when the agreement was made, and should be stipulated for in the contract itself. The rule would be otherwise too vague and indefinite; unlimited discretion would be left to the jury. Thus, when the plaintiff, a machinist, brought his action against a manufacturing company for machinery sold and delivered to them, and the defendants claimed a recoupment of the plaintiff's recovery by reason of his failure to deliver the machinery by the time stipulated for in the contract, to the amount that they would have realized from running the factory during the delay so occasioned by the non-delivery of the machinery, and for their losses of interest upon capital paid in and lying idle during said delay; such claims being for merely speculative profits are not the subjects of a cross action, and therefore not the subjects of a recoupment.

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FROM WILSON.

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Otis Pettee brought his action of *assumpsit* in the circuit court of Wilson, against the Tenn. Manufacturing Company for a balance due on account of machinery furnished them for their cotton factory in Lebanon. The declaration contains three counts; one upon a special contract in writing; one for goods sold and delivered, and one for money paid, laid out, and expended. The defendants plead *non assumpsit* and payment, with leave to give any matter in evidence that might be legally and specially pleaded. At the January Term, 1853

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Judge DAVIDSON presiding, there was verdict and judgment for the plaintiff for \$8,000, the balance due without interest. From this judgment both parties appealed. On the trial below, the defendants claimed a reduction of the plaintiff's recovery by reason of the delay occasioned them in commencing their operations by the failure of the plaintiff to deliver the machinery at the time stipulated for in the contract, and also for their losses of interest upon the amount of capital paid in, during the time of such delay. There was no reversal asked by the plaintiff's counsel in this court, and the case was argued on the question of *recoupment* as claimed by the defendants. The portion of the charge of Judge DAVIDSON excepted to by defendants, is given in the opinion.

E. H. EWING, READY and COOK, for the plaintiff.

JORDAN STOKES and GUILD, for the defendants.

F. B. FOGG, Special J., delivered the opinion of the court.

This is an action of assumpsit brought by Otis Pettee against the Tennessee Manufacturing Company, for a balance claimed to be due him for certain machinery furnished them for their cotton and woollen mills in Lebanon. There are three counts in the declaration, one on a special contract in writing, made the 8th day of September, 1847, whereby the plaintiff agreed to furnish the defendants with certain articles of machinery specified in the agreement, to be delivered, one-third on or

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before the first day of February, one-third on or before the first of March, and the remainder on or before the first of April, 1848, and when delivered the defendants were to pay the prices stipulated in the agreement, in a check at five days' sight drawn on Philadelphia, on receiving notice of the shipment of the same from Boston. In this count of the declaration, it is averred that the machinery was delivered according to contract, and that the value thereof was thirty-seven thousand, one hundred and sixty-six dollars and forty-five cents, of which only twenty-eight thousand five hundred dollars had been paid to him, leaving a balance due him of eight thousand six hundred and sixty-six dollars and forty-five cents, which the defendants refused to pay.

The second count is for machinery sold and delivered, and for materials, work, and labor, &c., according to the account annexed, in which a balance was claimed by plaintiff on the eighteenth of May, 1850, of nine thousand one hundred and forty-three dollars and ten cents. The third count was for money paid, laid out, and expended.

The pleas were non-assumpsit and payment, with leave to give any special matter in evidence. At January Term, 1853, the jury found a verdict in favor of the plaintiff, for eight thousand dollars.

The machinery was not delivered according to contract, but appears to have been delivered from the 26th of May, 1848, to the 14th of May, 1849, and was received by defendants in parcels, and payments were made by them at different periods from 31st of May, 1848, to April 25th, 1849, amounting in the whole to twenty-eight thousand five hundred dollars.

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There was proof tending to show that if the machinery had been delivered agreeably to the special contract, that the mills would have commenced operations in the spring of 1848, and that the profits of the mill might probably have been to a large amount, and that the capital stock was called in from the stockholders upon the faith of the compliance with the contract by the plaintiff, much sooner than it otherwise would have been, and that large sums were lost in the interest on their capital invested. It was also proved that expenses to the amount of upwards of five hundred dollars, had been incurred by the company in sending a special messenger to Massachusetts, where the plaintiff resided, and where the machinery was made, for the purpose of hastening the plaintiff in the delivery of the machinery. It appears, however, unnecessary to state the proof, as the cause has been argued in this court upon exceptions taken to a portion of the charge of the honorable circuit judge to the jury, and a refusal to grant a new trial for the error in the charge.

The court below charged the jury, that the plaintiff could not recover on the first count, in the declaration upon the special contract, because it was conceded that the machinery had not been delivered according to the terms of his contract. That upon the other counts in the declaration, he could recover the reasonable value of the machinery or benefit conferred, as the same had been received and enjoyed by the defendants. To this part of the charge all objections were waived.

The court also instructed the jury as follows: "It is insisted strenuously for the defendants, that upon the whole case they have a right to recoup (as the phrase



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is) the plaintiffs recovery to the extent they sustained damage by reason of the failure of the plaintiff to comply with his contract, and they insist first, that they can abate the recovery so much as they could have made by running the factory during the time they alleged they were delayed by the failure to ship the machinery; and secondly, at all events, to the extent of the capital paid in and drawing interest. But the court is of opinion that to enable the defendant to maintain his position, the claims for recoupment ought to be such that the defendants could maintain a cross action for it against the plaintiff. Such cross action will not lie for "delay in business" or for speculative profits. The consequence is that in the opinion of the court, the claim for recoupment of damages insisted on, falls within the principle announced, and which having been so held by the supreme court, this court feels bound to declare as the law, and to hold as furnishing no such defense as is made. If, therefore, the proof shows that the plaintiff failed to fulfill the special contract, if such failure caused a delay in business or delay in starting the operations of the factory, and if the profits they might have made by running it, were speculative and not capable of being arrived at or computed with reasonable certainty and precision, then the claim for recoupment or reduction of the recovery of the plaintiff cannot apply to that case."

To this part of the charge, the defendants excepted.

It is settled as the law of this State, by the case of *Porter vs. Woods, Stacker & Co.*, 3 Humph. 56, that after the abandonment of a special agreement, compensation for partial performance may be recovered, equal to and limited by the value and extent of the benefit conferred

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Therefore, the defendant is entitled to abate the recovery of the plaintiff by the damages he has sustained on account of the non-performance of the plaintiff's portion of the agreement. The plaintiff being entitled to recover for valuable materials furnished or beneficial services rendered, and only to the extent of the benefit conferred on the defendants, the latter must be entitled in abatement, and in ascertaining the extent of such benefit, to such damages as in a cross action he ought to recover for the non-performance by the other of his portion of the agreement.

In 5 Humph., 586, *Crouch vs. Miller*, it is decided that recoupment of damages is allowed the defendant in cases where the plaintiff, who has only partially performed his portion of the contract, comes into court asking compensation for such partial performance.

In 8 Humph., 678, *Fanning vs. Vanhook*, it is said by the court that the doctrine of recoupment is applicable to cases where there has been a special contract, which has been partially executed, but not according to its terms; then the defendant is liable to the plaintiff not upon the special contract which he has failed to execute, but upon an indebitatus assumpsit for so much as the defendant may be found *ex equo et bono*, to pay for the partially or defectively executed contract, and in such case, in order to ascertain what the defendant does, *ex equo et bono* really owe, he shall be allowed by way of recoupment, such damages as he has sustained by reason of the non-performance of the contract as it was entered into by the plaintiff, and which he could recover by a cross action.

These principles having been settled by our highest judicial tribunals, it seems useless to discuss the question which has been treated at large by Mr. Sedgwick in his learned treatise on the measure of damages; C. 17, p. 456 to 486, where all the cases have been collected, and where he expresses the opinion, that while recoupment originally merely implied a deduction from the plaintiff's demand arising from payment in part or in whole, or from recovery or some analogous fact, it is now understood to embrace counter-claims of the defendant, and to be in short a kind of irregular and unliquidated set off which has crept in notwithstanding the vigorous terms of the statute of set off. The doctrines asserted by him to have been adopted in the courts of New-York and Massachusetts, seem to be approved by the supreme court in Tennessee.

It follows from these principles, that the defendants could give in evidence in abatement of the sum sought to be recovered by the plaintiff, whatever damages they could have recovered in a cross action against him. When we look to the cases and elementary writers, we find the general rules laid down, that the damage to be recovered must always be the natural and proximate consequence of the act complained of. Greenl. Ev., vol. 2, p.210. Damages for breaches of contract are only those which are incidental to and directly caused by the breach, and may be reasonably supposed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses; 2 Kent's Com., 480 note. Although this is a general rule in its application to particular cases, there is the most serious and distressing difficulty, and the legal and natural con-

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sequence of an act or the natural and proximate consequence cannot easily be discerned. It must be left for the application to causes as may arise by sound and discriminating minds. There are, however, some cases which show that an allowance of damages, upon the basis of a calculation of profits, would be inadmissible. Such profits are too speculative and uncertain to make them the measure of damages. In the case of *Master-ton vs. The Mayor of Brooklyn*, 7 Hill, 73, Chief Justice Nelson says, "It is a very easy matter to figure out large profits upon paper, but it will be found that these, in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance." There is a great difference between the actual test of experience and speculative estimates of profits. Judge Story, in the case of the schooner *Lively*, 1 Gallison's R., p. 314, says, "an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. It would be a calculation upon conjectures and not upon facts."

In the case of *Blanchard vs. Ely*, 4 Wendell, p. 342, an action was brought for the price of a steamboat. The defendant proved that part of the machinery was unsound and other imperfections existed, by which considerable delay was caused, and claimed to deduct from the contract price of the boat, not only the sum necessary to remedy the actual defects, but also the loss of profits upon the trips that might have been run during the time the vessel was delayed on account of the imperfec-

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tions in the construction, having proved that each trip would bring one hundred dollars nett profits. But it was disallowed. This last case is referred to and adopted as law by our supreme court in the case in 3 Humph., 62, before cited, and our court there says, that in a cross action the defendant could not recover damages for delay in business for speculative profits, for expenses incurred in various trips to Cumberland Furnace.

In regard to the loss of interest on capital stock called in, which would not have been paid had not the defendants believed that plaintiff would have complied with his contract, we do not see in the records any satisfactory proof that such loss of interest had been sustained by the corporation, and if there were proof, we do not think that such losses would fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into. If speculative profits or losses of interest upon capital are to be taken into view in the assessment of damages they should be expressly stipulated for in the contract itself. The rule would otherwise be too vague and indefinite, and would have no reference to the particular thing which is the object of the contract, and unlimited discretion would be left to the jury. The jury in this cause have allowed no interest to the plaintiff for nearly three years, and have deducted near seven hundred dollars from the amount of his claim, which they had undoubted right to do.

The capital stock of the corporation was invested in lands, slaves, buildings, machinery and other property, as shown by the record, and there is no proof that any large sums of money belonging to the corporation lay

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\* J. L. Dearmon vs. W. Blackburn.

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idle or were uninvested, or for what time, or on what any interest lost could be calculated by the jury. It is probable the loss of interest was to the individual stockholders, and not to the corporation itself. Upon the whole, we think there is no error in the record, and the judgment will be affirmed.

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J. L. DEARMON vs. W. BLACKBURN.

REPLEVIN. *When the action does not lie.* The action of replevin cannot be maintained by a party for his goods taken by an officer under process of law, where such party is defendant in the process. It can only be maintained by a stranger to such process. *Vide Shaddon vs. Knott, 2 Swan. 358.*

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FROM DE KALB.

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The plaintiff in error, as sheriff of DeKalb, levied a writ in replevin upon corn in possession of the defendant in error, at the suit of Matthew Williams and wife, who claimed the corn as rent for the land upon which it was produced, which had been rented to the defendant in error by the wife of said Williams *dum sola*. The levy was made on the 6th November, 1851, upon the corn standing in the field which the sheriff proceeded to gather and heap together in the field, but before he could deliver the same, it was taken out of

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his possession by the coroner under a counter writ in replevin, sued out by the defendant in error, and the sheriff made his return accordingly. The reasons for the cross action it is not necessary to recite, as the case turned upon its validity merely. There was verdict and judgment in the circuit court, Judge KETH presiding by interchange, for the plaintiff in replevin, from which sheriff Dearmon appealed in error.

COLMS and CANTRELL for the plaintiff in error.

W. M. WADE and SAVAGE, for the defendant in error.

CARUTHERS, J., delivered the opinion of the court.

Dorathy Grey rented a tract of land to Blackburn for 1851, at two barrels of corn per acre for nineteen acres, to be delivered in the crib. Before the rent became due she married Matthew Williams. On the 4th of November, 1851, Williams and wife commenced an action of replevin for forty barrels of corn against their said tenant in the circuit court of DeKalb. The sheriff Dearmon under said process, returns that he "took the corn described in this writ, but before I could get it delivered to the plaintiffs, it was taken from me by the coroner of DeKalb." On the 6th of November, 1851, after the corn had been seized on the former writ, the defendant in that action, the present plaintiff, Blackburn, instituted this action of replevin against the sheriff Dearmon, and the corn was retaken by the coroner. And now the question is, can this counter action of replevin be sustained? We think it

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cannot, and that the law ought to have been so charged by his Honor the Circuit Judge.

Replevin was originally in England only applied as a remedy in cases of distress for rent, and is so confined yet in Virginia, 1 Rob. Pr., 408, and Mississippi, 6 Howard, 279; but it has more recently been considered in England as applicable to all cases of wrongful detention of chattels. 2 Starkie's Rep., 288. 1 Chitty, Gen. Pr., 811; and such has been the extent given to this remedy by our act of 1846, ch. 65, as construed by this court in a case decided at last Term, and to be reported in 2 Swan.

But it is presumed that no case in any court has gone to the extent demanded in this case. It does not lie where goods are taken by process of law by the parties against whom the process issues, but only by a stranger to the process, whose goods are taken. 2 Greenleaf's Ev., § 560. 3 Kent, 484 note. Even the right of a stranger is limited in New York to goods not in possession of the judgment debtor at the time they are taken. 9 Cowan, 259.

In the case before us, the goods were taken into the possession of the sheriff by process of law, and this action of replevin instituted against him by the defendant in that process. If this could be allowed, then the sheriff could have brought replevin against him the next day. This mode of proceeding cannot be tolerated; it would be trifling with the process of the law, and render its remedial powers utterly nugatory, as well as intolerably oppressive.

But it is said that the sheriff, under the first writ of replevin, seized property that was not liable to be



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J. L. Dearmon vs. W. Blackburn.

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taken according to law, viz: corn growing in the field; and further, that replevin would not lie for rent corn not delivered, as the lessor had no property in the corn until it was gathered and delivered to him, or until he had obtained a judgment on his claim for rent and levied his execution upon it. This may be all very true, yet it would not authorize a counter replevin, but might be relied upon in defense of the other action, and if made out by the proof would be sufficient to defeat it. The remedy of Blackburn would be fully available in defense; the action against him, and a new action of replevin by him for the same property, was entirely unnecessary and improper, and cannot be maintained. The Judge should have so instructed the jury, and thus defeated the action, when the parties would have been left to litigate their rights on the first action of replevin of Williams and wife against Blackburn.

Judgment reversed.

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Green B. Simpson *et al.* vs. William S. Smith *et al.*

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GREEN B. SIMPSON *et al.* vs. WILLIAM S. SMITH *et al.*

1. WILL. *Construction. Supplying words.* In the construction of a will all its parts are to be construed with reference to each other. The entire instrument, and not disjointed parts of it are to be considered in ascertaining the intention of the testator, and words may be supplied in order to effectuate his intention when it is obvious from the context.
2. SAME. *Application of the principle that words may be supplied in a will.* There must be connexion by grammatical construction; direct words of reference, or by the declaration of some common purpose between distinct bequests in a will, to justify the drawing in aid the special terms of one bequest to construe another. And this is so, although there may be no apparent reason except the different wording of the clauses, to presume that the testator had a different purpose in view.

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FROM FRANKLIN.

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This bill was filed by the complainants in chancery at Winchester, against the defendant Smith, as executor and trustee under the will of William Smith, deceased, and others, asking that the will of said testator be construed, and the rights of the complainants stated and declared. The clauses of said will upon which the controversy arose are fully given in the opinion as well as the question at issue arising thereon. Chancellor RMLEY, at the August Term, 1853, decreed in favor of the complainants, from which the defendants appealed to this court.

H. L. TURNEY, for the complainants.

W. E. VENABLE, BRIGHT and COLYAR, for the respondents.

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Green B. Simpson *et al.* vs. William S. Smith *et al.*

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McKINNEY, J., delivered the opinion of the court.

The bill, among other things, asks the Chancellor to construe a certain bequest contained in the will of William Smith, deceased, and to declare who are entitled to take under the same.

The part of the will necessary to be noticed for the purpose of presenting the point to be decided, is as follows:

"The property that I die possessed with, my desire is for it to be sold, and the money to be equally divided among such of my children as I shall name, viz: Fanny Espridge, an equal part; Jane Day's children an equal part, to be left in the care of Wm. S. Smith, to let them have when they come of age, or marry; John P. Smith I give an equal part; Joanna Houston's children an equal part, to be left in the hands of Wm. S. Smith; Eliza L. Parks an equal part," &c.

The testator died in 1829. At his death Joanna Houston had three children living, and five were born afterwards. On behalf of the afterborn children it is insisted that the words contained in the preceding bequest to Jane Day's children—viz: "to let them have when they come of age, or marry," ought to be supplied in the bequest to Joanna Houston's children; and the same construction and legal effect be given to the latter as to the former bequest, so that all the children of Joanna Houston, born before the distribution of the fund, may be let in to share equally in the bequest. The Chancellor so decreed. Upon authority this decree cannot be supported. It is admitted that words may

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be supplied in a will in order to effectuate the obvious intention as collected from the context. It is also conceded that the construction of the will is to be made upon the entire instrument and not upon disjointed parts of it; and consequently all its parts are to be construed with reference to each other.

But the authorities lay it down, that, in the application of the principle as to supplying words where there is no connexion by grammatical construction, or direct words of reference, or by the declaration of some common purpose between distinct bequests in a will, this principle will not justify the drawing in aid the special terms of one bequest to the construction of another, although in its general terms and import, similar and applicable to persons standing in the same degree of relationship to the testator; and although there is no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view. 2 Williams on Ex'rs, 929.

Words cannot be supplied upon mere conjecture in order to equalize estates created by several and independent devises or bequests in favor of persons with respect to whom the testator has expressed no uniformity of purpose, though it may be reasonably conjectured that he had the same intention as to all. 1 Jarman on Wills, 432, margin. In such case, in the language of Lord Ellenborough, the more natural conclusion is, that as his expressions are varied they were altered because his intention in both cases was not the same. *Id.* 435.

This doctrine needs only to be stated in the explicit language of the authorities above referred to, to show

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that it is decisive against the construction of the bequest declared by the Chancellor.

The decree will be reversed.

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HENEY TURPIN vs. R. D. WILLIAMS.

**ENDORSERS.** *Their rights against prior endorsers.* A second endorser of a bill of exchange, who has paid the debt or any part thereof, under legal compulsion, may recover the same of his prior endorser in an action of assumpsit as for money paid to defendant's use, and is not obliged to resort to his remedy on the bill.

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FROM BEDFORD.

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Henry Turpin instituted his action of assumpsit on the 16th day of November, 1852, against Robert D. Williams, in the circuit court of Bedford, and filed his declaration at the following April Term of said court, containing four counts. The first, is a count declaring upon a bill of exchange, drawn by D. M. Ellis on W. J. Ledyard, payable to Robert D. Williams, and by him endorsed to the plaintiff, bearing date the 9th of November, 1848, and due at four months, duly protested for non-payment March 12, 1849, with the usual averments of protest and notice. The second count is

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for money lent and advanced by the plaintiff for the defendant, and at his special instance and request. The third is a count for money paid, laid out and expended by the plaintiff for the defendant, and at his special instance and request. The fourth is a special count in *assumpsit*, in which it is averred that the Bank of Tennessee was the owner of a certain bill of exchange drawn by one D. M. Ellis for the sum of \$750, payable to Robert D. Williams and endorsed by Robert D. Williams, to the plaintiff, Henry Turpin, and by said Henry Turpin to Joshua Hall, and by Joshua Hall to the Bank of Tennessee; that afterwards said bill of exchange was sued on in the circuit court of Bedford county in the name of the President and Directors of the Bank of Tennessee, and a judgment recovered against said Ellis, Williams, the plaintiff Turpin, and Joshua Hall, in December, 1849, for the sum of \$750, and which judgment Henry Turpin, the plaintiff, satisfied on the 27th of April, 1850, at the special instance and request of Robert D. Williams, the prior endorser of the said Henry Turpin, out of his own means, and which said Williams, as the immediate endorser of the plaintiff, was bound to pay before the plaintiff, and when paid by the plaintiff the said defendant became liable to pay him the said amount when demanded. The defendant plead *non assumpsit* and the statute of limitations to the first three counts, and filed a *demurrer* to the fourth. There was joinder in demurrer and judgment, Judge DAVIDSON presiding, on the demurrer, sustaining the same. The plaintiff thereupon entered a *nolle prosequi* as to the first three counts, and appealed in error to this court from the judgment on demurrer.

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Henry Turpin vs. R. D. Williams.

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ED. COOPER, for the plaintiff in error, said:

1. The question presented to the court in this record is, whether a subsequent endorser on a bill of exchange, who has been sued by the holder of the bill, jointly with the prior endorsers on the same bill, and a judgment recovered against them all, which he has been compelled by execution to pay, can sustain an action for money paid, against either one of the prior endorsers on the bill of exchange, which was sued on, and particularly his own immediate endorser? Now, this is a question of authority; and upon an examination of them I think that the Court will see that the Court below erred in sustaining the demurrer.

2. It is a well settled principle of law, recognized by all legal minds, that where the plaintiff has been *compelled* to make a payment of the defendant's legal debt, in consequence of his omission or neglect to discharge it, the law infers that the defendant requested the plaintiff to make the payment for him, and gives the action for money paid. Story on Contracts, 1st ed., p. 480, § 474. Chitty on Contracts, pp. 594, 595. 1 Chitty's Pleading, 350, 351, note.

Now, as regards the plaintiff, the defendant was under a legal obligation to take up the bill of exchange when it became due, when it was ascertained that the drawer and the defendant's immediate endorser had failed to pay it; and after judgment was recovered against the defendant and the plaintiff, by the Bank of Tennessee, this legal liability, on the part of the defendant still existed, and was binding upon him.

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It is not questioned that the plaintiff has paid and satisfied a judgment against the defendant and himself, which the defendant was primarily liable to pay, and which the defendant ought to have paid; but it is urged on the part of the defendant that the suit should have been brought by the plaintiff on the bill of exchange, the plaintiff having paid off the entire judgment. But we can see no force in the views thus presented against the weight of authority sustaining the position which we have taken. Nor are we without express authority on the very question now under discussion; cases which have been decided under a similar statement of facts, and by courts of acknowledged ability: 1st. The case of *Butler vs. Wright*, 20 Johns. R., 367, is the first adjudication on this subject, and which fully sustains the declaration in this case. 2nd. The same case of *Butler vs. Wright*, came again before the Supreme Court of New York, and is reported in 2 Wendell, 369, where the former case is expressly recognized as good law. See also, *Gregory vs. Burnett*, 2 Wendell, 391. 3rd. Once more did the case of *Butler vs. Wright*, go before the Supreme Court of New York, when the Court re-affirmed its former decisions, with additional arguments; 6 Wendell, 284-290; where the Court uses the following very clear and explicit language: "The action on the money counts are resorted to as substitutes for bills in chancery, and ought to be encouraged whenever the plaintiff seeks to recover of the defendant a sum of money which the plaintiff has been compelled to pay for his benefit." 4th. But we refer the Court to the case of *Pownal vs. Ferrard*, 4 Barnwell & Cresswell, 439; which is referred to and



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approved by the Supreme Court of New York, as deciding the very question now under discussion; and in which case Lord Tenterden, C. J., said: "That the plaintiff was entitled to recover upon the general principle that one man who is compelled to pay money which another is bound by law to pay, is entitled to be re-imbursed by the latter; and that money paid under such circumstances is money paid to the use of the person who is so bound to pay it." Chitty on Contracts, 595, 596, n. r., 63. *Bleaden vs. Charles*, 7 Bing, 246. *Jenkins vs. Tucker*, 1 H. Black., 90. *Cole vs. Crushing*, 8 Pick Rep., 48. *Rodman vs. Hedden*, 10 Wendell, 498.

Against these authorities the defendants rely on an *obiter dictum* of the Chancellor in 6 Wendell, 290, where he states: "That if the plaintiff had been the legal owner of the whole of the note at the time the suit was commenced, so as to have been in a situation to strike out the subsequent endorsements and recover against the prior endorser in the usual manner, by a special count on the note itself, that the action for money paid could not be sustained." Why? No reason is given by the judge, nor can a sufficient reason be found to sustain the distinction here attempted to be made.

The action is founded expressly upon the ground that the plaintiff has been *compelled by law* to pay the money sued for, when the defendant was primarily and legally entitled to pay it before the plaintiff. Besides, how could the plaintiff in this case have obtained the bill of exchange? And if he could obtain it, what right would he have to strike out the subsequent en-

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dorsements, so as to vest the title in the plaintiff; or even if he could do so, and thereby authorize the plaintiff to sue on the bill of exchange, does that destroy the plaintiff's right to recover in an action for money paid?

At the time the plaintiff paid the money there was an existing judgment against the defendant and the plaintiff, which the defendant was legally bound to pay. He was also primarily liable to pay it before the plaintiff, but the plaintiff paid the money. Now, has he not the right, under law, to recover the amount thus paid? If he has, when did his right of action accrue? *Hickman vs. Searcy*, 9 Yerger, 47-51. *Marshale vs. Hudson*, 9 Yerger, 57-64.

The Court can readily see why the defendant insists that the plaintiff should sue on the "bill of exchange." It fell due on the 12th March, 1849, and this suit was brought on the 16th November, 1852, and the defendant pleads to a suit on the bill, "the statute of limitations."

Having the choice of remedies, the plaintiff elects one that is not barred. In doing so he only desires to protect himself; not to injure the defendant. With his money he has, under the compulsion of the law, paid the defendant's debts; and he asks to recover his own?

R. B. DAVIDSON, for the defendant in error.

The only question in this case is, whether an endorser who has paid the full amount of a bill of exchange to the holder under legal process, can maintain assumpsit for money paid to the use of a prior endorser.

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The subject has been very fully discussed in New York, in the case of *Butler vs. Wright*, first tried in the supreme court of the State and reported in 20 Johnson, 367; and on appeal to the supreme court of errors reported in 6 Wendell, 284. In both courts it was held that the defendant and the plaintiff having endorsed a note to a bank, which was protested for non-payment, and the bank having recovered judgment against the plaintiff as second endorser, and he having paid part of the judgment; though the plaintiff could not maintain an action on the note, as it had not been fully paid, and was the property of the bank; yet, that he might sustain an action against the defendant, and recover the money paid by him, on the count for money paid for the defendant at his request. But in the supreme court of errors the Court unanimously held, that where the plaintiff had paid the whole amount of the note and taken it up, so that he might maintain an action directly on the note, the suit on the money counts could not be sustained.

Where the payee and endorser of a promissory note, who endorsed it for the accommodation of the maker, and without any consideration between them, and who afterwards was compelled to pay the amount to the holder, it was held he cannot recover from the maker on any of the money counts in *indebitatus assumpsit*, but must sue on the note; and that the statute of limitations runs from the time the note fell due; not from the time the endorser paid it. Angel on Limitation, p. 100, citing *Kennedy vs. Carpenter*, 2 Wharton's (Penn.) R., 344; and referring to *Hoyt vs. Reed*, 2 Black. (Ind.) R., 369.

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Henry Turpin vs. R. D. Williams.

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TOTTEN, J., delivered the opinion of the court.

The defendant, as first endorser of the bill, was liable to pay the money; and the plaintiff, who is second endorser, having been compelled by law to pay it when the defendant was liable to pay, the law will imply a promise on the part of the latter to repay the money. "For it is general principle, that a man who pays the debt of another by compulsion, may recover from him the amount of the debt so paid."

It is said that the plaintiff, by making this payment, was only remitted to his remedy upon the bill; but, we do not think so. It is true, he might take up the bill, erase his own endorsement, and institute a suit upon it, but is not compelled to adopt this remedy. He may sue for money paid to defendant's use. In *Poronal vs. Ferrand*, 6 Barn. & Cres., 439, a similar case, Holroyd, J., says: "I am of opinion that the plaintiff is entitled to recover in this action upon the same principle upon which a surety is entitled to recover money from his principal.

"I think that a party is not bound to resort to the original engagement unless it be by deed, but that he may, at his election, found his action upon the original engagement, or bring *indebitatus assumpsit* for money paid."

We think this is a sound principle, and that it will apply as well where the *whole amount* due on the original engagement is paid, as a *part of it*.

We can see no reason or principle for a distinction founded on that circumstance. Chitty on Contracts, 513. Bayless on Bills, 274.

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John A. Revier vs. Robert H. Hill.

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Let the judgment be reversed, and the cause be remanded.

Judgment reversed.

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JOHN A. REVIER vs. ROBERT H. HILL.

NOTES WON AT GAMING. *In the hands of assignee with notice.* A party losing notes at any unlawful game may recover the same, or their value, in the hands of the assignee of the winner, who has notice of the defect in the winner's title, if the action be brought within ninety days from the time of such loss.

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FROM MAURY.

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This was an action of trover, brought by the plaintiff against the defendant for the conversion of certain promissory notes which one Holcombe had won from the plaintiff in a certain game of cards, and which said Holcombe had assigned to the defendant in error, who had full notice of the manner in which Holcombe had obtained them. The suit was instituted within a day or two after the loss, in the circuit court of Maury, where there was verdict and judgment for the defendant, Judge MARTIN presiding, from which the plaintiff appealed in error.

PAYNE and GAUNT, for the plaintiff.

M. S. FRIERSON, for the defendant.

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John A. Revier vs. Robert H. Hill.

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TOTTEN, J., delivered the opinion of the court.

Trover for the conversion of notes and securities for money.

These notes and securities were won from plaintiff by Thomas Holcombe in an unlawful game of cards. They were assigned by the plaintiff to Holcombe, and by him to the defendant, who had full knowledge that they had been won at said unlawful game; and they were taken by him to secure an existing debt.

His Honor, the circuit judge, instructed the jury that the action could not be maintained, as the defendant was not the *winner* of the notes.

In this we think there is error. It is true, that the act of 1799, ch. 8, § 4, provides in *terms* for an action against the *winner* to recover money or goods lost at play. But if he deliver the money or goods to another, who has notice of the defect in his title, such person stands in the place of the winner, and can have no better title. This is true in other cases where an assignee or purchaser has notice of a defective title. He holds subject to the claim of the rightful owner. In a case like this the rule applies with peculiar force, as a different construction would, in a great measure, defeat the object and policy of the law.

Let the judgment be reversed and the cause be remanded.

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Archibald Quarles vs. The State.

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## ARCHIBALD QUARLES vs. THE STATE.

1. **HOMICIDE. Malice.** Malice cannot be inferred from the deadly intent merely, for that may exist in a case of self defense, as where one from evident necessity wilfully kills another to save his own life; much less can malice be inferred where the intent to kill is produced by anger, for if that were sudden and upon reasonable provocation, the killing would not be murder.
2. **SAME. Intention.** Where one person kills another, the presumption arises that the intention accorded with the act, but if the intention and act were the result of impulse and passion, excited upon sudden and adequate provocation, the idea of malice is repelled, and the killing is only manslaughter. We are not to suppose that a person thus excited is deprived of all reason, so as to be incapable of purpose or intention. That is not the state of mind. But being greatly excited upon a sufficient cause he is impelled by a sudden motive of revenge to do the act, and that excludes the idea of malice.
3. **SAME.** A prisoner arraigned on a charge of murder is entitled to a correct and distinct exposition of the law as to the several grades of offence involved in said charge, and it is not always safe to speculate as to the effect of an error in this respect, or to assume that the prisoner was not injured thereby.

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FROM OVERTON.

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The plaintiff in error was indicted in the circuit court of Overton, for the murder of Benj. B. Ray. At the February Term, 1853, he was tried and convicted of voluntary manslaughter, and sentenced and adjudged to eight years imprisonment in the penitentiary. The facts and the charge of the court are given in the opinion. A motion for a new trial being overruled, he appealed in error to this court.

GARDENHIRE for the prisoner.

SWAN, Attorney General, and Swope for the State.

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Archibald Quarles vs. The State.

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TOTTEN, J., delivered the opinion of the court.

The prisoner was charged by indictment in the circuit court of Overton, with the murder of Benj. B. Ray. He was acquitted of the murder, was convicted of manslaughter, and sentenced to imprisonment in the Penitentiary for eight years.

From the judgment therein, he appealed in error to this court.

It appears that the prisoner and Ray, the deceased, resided a mile apart; each of them desired to purchase a tract of land that lay between them; prisoner became the purchaser, at which Ray became deeply offended. He made frequent threats against the prisoner; threatened to whip him, to make him take the cliffs; that he would have the land or have blood. Ray, when sober, was peaceable, but was of quick temper, determined courage, overbearing disposition, and great physical strength. He sometimes carried weapons; had a bowie-knife and revolver, but was never known to use them.

On the contrary, it appears that the prisoner, though of good size, is of weak and feeble health; affected by a disease in the back and otherwise; that he is of pacific disposition, and had at a former time passively yielded, at his own house, to the turbulence and abuse of Ray. Ray's threats and character were well known to the prisoner. On the day of the last Presidential election, the prisoner, in order to avoid Ray, did not go where he and Ray usually voted, but started to a ballot box in another district. He called at Hampton's on business; Ray came in, was spoken to civilly by the pri-



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soner, who immediately left the house. He was pursued by Ray, who denounced him, and struck him three blows with his fist, when the prisoner stabbed him in the side with a knife, and of this wound Ray died the third day thereafter. Such is the general character of the case.

His Honor, the Circuit Judge, instructed the jury in these words: "If the defendant struck the deceased the blow with the knife, with a deadly intent produced by anger, the killing would be murder in the second degree. But if the defendant was leaving the deceased, and was by him accosted, and the deceased commenced inflicting blows upon him, the defendant, and excited by sudden heat, and without intending to take life, he stabbed the deceased, of which he died, such killing would be manslaughter."

This instruction is erroneous. If the prisoner used the knife "with deadly intent produced by anger," the homicide is not murder, for it wants the element of malice. We are not to infer malice from the "deadly intent" merely, for that may exist in a case of self-defense, as here one, from evident necessity, wilfully kills another to save his own life. Much less can we infer it where the "intent is produced by anger," for if that were sudden and upon reasonable provocation, the killing would not be murder. And so, in reference to manslaughter the same idea prevails in the charge; that is, that the killing would not be this offense if the prisoner "intended to take life," though it be on sudden impulse and passion excited upon reasonable provocation. But manslaughter may be voluntary, as where, upon a sudden quarrel two persons fight, and

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one of them kills the other. We are to presume that the intention accorded with the act; but if the intention and act were the result of impulse and passion, excited upon sudden and adequate provocation, the idea of malice is repelled, and the killing is only manslaughter. We are not to suppose that a person thus excited is deprived of all reason, so as to be incapable of purpose or intention. That is not the state of the mind; but being greatly excited upon sufficient cause, he is impelled by a sudden motive of revenge, and that excludes the idea of malice. The judge next proceeds to instruct the jury upon the rights of self-defense, not material to be here noticed; but in view of the whole case, we must say that we are not satisfied with its result. There is no question, but that it is a case of manslaughter or self-defense, and we are to infer from the charge and the verdict, that the jury were of the opinion that the prisoner did not intend the death of his assailant, but a less injury. We cannot say that the error we have noticed had no injurious influence upon the verdict, either as to the guilt or the degree of punishment. It is not always safe to speculate as to the effect of such errors, and to assume that the accused was not injured by them. He was entitled to a correct and distinct exposition of the law as to manslaughter and self-defense, and the proper distinctions which apply to those offenses.

As to the facts, they present a strong case of unprovoked wrong and violence upon the person of the prisoner, and leave the mind in doubt whether he was not justified in repelling the attack in the only manner which seemed to be in his power. We think it proper

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that the case be again submitted to a jury, and we do so without comment upon the evidence. Let the judgment be reversed and the prisoner be remanded for another trial.

Judgment reversed.

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BALDWIN vs. THE STATE.

1. **INDICTMENT.** *Larceny. Description of Bank Notes.* A description of bank notes in an indictment for larceny, as one bank bill on the Bank of Tennessee, of the denomination of ten dollars, and of the value of ten dollars, and one bank bill on the Planters' Bank in Tennessee, of the denomination of ten dollars, and of the value of ten dollars, is a sufficient description.
2. **EVIDENCE.** *Identity of Stolen Bank Note.* Where the indictment for larceny, charged a bank bill the article stolen, as a bank note of three several banks of Tennessee, and the owner could only prove that it was on one of the three banks named ; and the prisoner confessed his guilt as charged, and that he had passed a Tennessee bank note of the denomination stated soon after the felony : *Held*, that the jury were well warranted in the conviction of the prisoner, and in the conclusion that the bank note passed by the prisoner, was the same lost by the prosecutor.

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FROM JACKSON.

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The plaintiff in error, was indicted and convicted at the November Term, 1853, of the circuit court of Jackson, for the larceny of a bank note. The indictment in a single count describes the bank note as "one bank bill on the Bank of Tennessee, of the denomination of ten

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dollars, and of the value of ten dollars, one ten dollar bank note of the value of ten dollars, one bank note on the Union bank *in* Tennessee, of the denomination of ten dollars, and of the value of ten dollars, and one bank bill on the Planters' Bank *in* Tennessee, of the denomination of ten dollars, and of the value of ten dollars." The material facts proved at the trial, are stated in the opinion. The prisoner moved for a new trial and in arrest of judgment, which being overruled by the court, Judge GOODALL presiding, he appealed in error to this court.

GARDENHIRE, for the prisoner.

There are in effect four counts in the indictment, the first, third and fourth of which are clearly not sustained by the proof. They contain matter essentially descriptive of the bills supposed to have been stolen, and the proof must correspond with the allegations. 1 Greenl. Ev., § 56, 58. 2 Russell on Crimes, 106-7. Wharton's Cr. Law. p. 127-8.

2. The second count is clearly bad, because it charges no fact or circumstance, which identifies the thing stolen. Every fact necessary to be proved, and which is essential to conviction, must be alleged in the indictment, and there must be some evidence of identity; to prove the chattels to be of the same kind will not do. 2 Russell on Crimes, p. 125. Roscoe's Cr. Ev., p. 63.

3. Lost property is not the subject of larceny. M. & Y. R., p. —. 2 Russell, p. 11-12.

4. The thing must be proven of some value. 2 Russell, 125. Roscoe's Cr. Ev., p. 63.

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5. It must be proved genuine. 3 Greenl. Ev., p. —. Wharton's Cr. Law, p. 128.

6. Confessions, to be received, must neither be influenced by hope or fear. His confessions were after inducements were offered by the prosecutor, which doubtless influenced him at the time. Such evidence ought to be received with great caution. For besides other considerations, it should be recollected, that the mind of the prisoner himself, is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession. 1 Greenl. Ev., § 214. Boorn's case, Vermont, 1819, *Id.*, note 2.

A confession without proof of the *corpus delicti*, is not sufficient. 1 Greenl. Ev., § 217. If the note was lost, it was not the subject of larceny. If it was not, then the proof does not show it to be genuine or of any value, and the body of the offence cannot be shown without them. See *Tyner vs. The State*, 5 H., 383, 385.

JOHN P. MURRAY, for the prisoner.

This is an indictment against defendant for larceny, there is to the indictment four allegations: First, for stealing a ten dollar bank note on the Bank of Tennessee; second, for stealing a ten dollar bank note, of the value of ten dollars; third, for stealing a ten dollar bank note of the Union Bank; fourth, of the Planters' Bank.

The evidence does not sustain the first, third and fourth allegation. We contend that the second allegation is an insufficient description of the subject of the offence. See 1 Russell on Crimes, 106. 1 Chitty's Cr. Law, 285;

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3 vol. 946. 2 Hale's P. C., 182-3. Archbold's Cr. Pleading, 49; *State vs. Longbottom*, 39.

2. The note must be shown to be genuine by the State, by witnesses acquainted with the money, See 1 Notingham & McCord's Rep., 9. 3 Binney, 533, *Steele vs. Hickman*, 3 Halstead, 229. *The People vs. Coryl*, 12 Wendell 547. New-York Digest, 372. 3 Greenleaf, 141, § 153.

3. The proof is that the note was lost. Lost property, is not the subject of larceny. See Martin & Yenger.

4. The confessions of the prisoner should not have been received, as they were forced from the mind by the flattery of hope. See 1 Peck's Rep., 143. 2 Tenn., 80 to 87. 9 Humph., 639. 2 Starkie, 26 to 28. 1 Greenl. 221. 1 Phillips, p. 10. Note to 1 Phillips Ev., 261, p. 431. Roscoe, p. 43-44. Russell, 834, vol. 2.

5. We contend that a confession directly inadmissible, cannot be admitted for the purpose of raising a presumption against the prisoner, therefore the court erred in admitting proof that the prisoner said in his confession that the bill was an Indiana bill, to contradict his written statement.

6. We contend that there was error in the practice of the judge, in admitting the evidence of Stith, when we offered to show by evidence *aliunde* that there had been previous promises made to the prisoner to confess. Illegal testimony should never be admitted to go to a jury with a view of withdrawing it. It should be rejected on a preliminary examination. See 1 Greenl., 219. Chitty's Cr. Law, 271. McNally, 43. 1 Mass. Rep., 144. 1 Pickering, 477.

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The magistrate had no right to interrogate him. See 1 Greenl., 293, § 225, note 5.

McKINNEY, J., delivered the opinion of the court.

The indictment in this case contains but one count, which charges the defendant with stealing: "One bank bill on the Bank of Tennessee, of the denomination of ten dollars, and of the value of ten dollars; and one ten dollar bank note, of the value of ten dollars; one bank note on the Union Bank in Tennessee, of the denomination of ten dollars, and of the value of ten dollars; and one bank bill on the Planters' Bank in Tennessee, of the denomination of ten dollars, and of the value of ten dollars;" the property of Samuel A. Moore. The defendant was found "guilty in manner and form as charged in the indictment," and prosecuted an appeal in error.

Various questions are raised in the *briefs* filed by the counsel for the plaintiff in error, upon which we are requested to express our opinion.

1. As respects the sufficiency of the description in the indictment, of the notes alleged to have been stolen; without entering into any discussion upon this point, we think it sufficient to say, that the description of the first, third and fourth notes, charged to have been stolen, is subject to no exception, more especially after verdict. The degree of certainty and particularity, of description contended for, would in this class of cases, tend to defeat the administration of justice, and insure impunity to the guilty.

2. Is the evidence sufficient to support the verdict? We think it is. The note stolen is proved by the prose-

cutor, to have been a ten dollar note of the Bank of Tennessee. The defendant upon being arrested, and brought before the justice to answer this charge, when asked by the justice whether he was guilty or not guilty, freely admitted that "he was guilty according to the charge in the warrant." And on the trial in the circuit court, the defendant admitted in writing, over his own signature, that he "passed a ten dollar Tennessee bill to Eubanks of Hopkinsville, Ky., shortly after the time that this offence is charged to have been committed." This evidence, in connection with the other facts established by the proof, well justified the jury in the conclusion, that the Tennessee Bank note passed to Eubanks, was the same note stolen from the prosecutor. True, the proof does not show by which of the several Banks of Tennessee, said note was issued, but the jury were warranted in the conviction of the defendant, if they were satisfied that it was a note of either of the Banks specified in the indictment; and this fact is to be determined by them upon all the evidence in the case.

3. It is said, and the position is correct, that it was necessary to establish that the bank note alleged to have been stolen, was genuine and of value. So the jury were instructed by the circuit judge, and upon this point there is sufficient proof to sustain the verdict. The defendant admitted to the prosecutor that he had passed the note to Eubanks "for goods," to hire votes in the Kentucky election. By the defendant's own admission, then, the note was at least *prima facie* genuine, and of the value imported upon its face.

4. Whether the note was stolen or found by the defendant, was a fact properly submitted to the jury, to



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determine from the proof, under correct instructions as to the law; and we think they were well justified in the conclusion that it was feloniously taken.

5. There is nothing in the record before us, raising any question of practice in respect to the admission of confessions, and therefore we express no opinion upon this point.

Judgment affirmed.

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EAKIN & Co. vs. S. N. BURGER *et al.*

1. PLEADING. *Non-assumpsit*. While it is true that upon a plea of non-assumpsit not verified by affidavit, the maker of a note cannot deny the execution, nor the endorser his endorsement thereof; yet upon such plea without oath, either is at liberty to urge if the fact be so, that from the plaintiff's own showing upon the face of the declaration, he has no legal interest in the note, and consequently can maintain no suit thereon.
2. SAME. *Misjoinder of parties*. *Statute of jeofails of 1852, ch. 152*. The act of 1852, ch. 152, authorizing amendments in pleading, and the striking out and supplying parties to an action does not extend to cases where suit is brought against the maker and endorsers of a negotiable instrument in the name of the holder to whom the legal title has not passed.
3. SAME. *Same. Same*. Where the holder of a negotiable note to whom the same had been transferred by the payee without endorsement, but with the guaranty of said payee written upon a separate piece of paper, brought an action of assumpsit in his own name against the maker, endorser, and guarantor, and in one count of his declaration set forth the guaranty and the precise liability of the guarantor: *Held*, that though he could not recover in said action against the maker and endorser, for want of legal

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title, yet by virtue of the act of 1852, ch. 152, he may recover in said action against said guarantor.

4. AMENDMENT. *Rule as to construction of statutes of amendment.* The general rule as to statutes of amendment and *jeofails*, is that the amendment need not in fact be made; the benefit of the statute is obtained by the courts overlooking the exception, and considering the amendment as made.

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FROM CANNON.

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This was an action of *assumpsit* brought by Eakin & Co., in their own names, against S. N. Burger, A. Burger, and T. T. Peay. The declaration contains three counts. The first on a note made by S. N. Burger, and endorsed by A. Burger and T. T. Peay. The second describes the note as endorsed by A. Burger, and delivered by T. T. Peay to the plaintiff with his written guaranty; and the third describes the note as endorsed by A. Burger, and delivered with a separate guaranty to the plaintiffs by Peay. The defendants plead *non-assumpsit*, with liberty to give special matter in evidence. On the trial, the plaintiffs introduced in evidence a note as described in the declaration made by S. N. Burger, and endorsed by A. Burger to T. T. Peay, and proved that the latter sent it to the plaintiffs enclosed in the written guaranty, with intent to bind himself as endorser. The words of the guaranty are given in the opinion. The court, Judge DAVIDSON presiding, charged the jury, that if it appeared from the evidence that the note was endorsed by A. Burger to T. T. Peay, and there was no regular endorsement or assignment to the plaintiffs by Peay, the suit could not be brought by them in their own names, and that the written guaranty was not such an assignment as would pass the legal title. The

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jury found for the defendants, and the plaintiffs appealed to this court.

G. W. THOMPSON, for the plaintiffs in error.

We think the charge of the court is erroneous, in view of the pleadings.

There is no plea put in by the defendants of a misjoinder of parties, or that the legal title to the note was not in the plaintiffs, as is set forth in the declaration, which must be done, in order to avail themselves of such defense. See 2 Swan's Rep., p. 59, *Oliver vs. Bank of Tennessee*.

The defendants should have demurred or put in some plea that would have traversed the plaintiffs' title to the note, but the plea of non-assumpsit, which was the only plea put in, does not put in issue the plaintiffs' right to the note.

If a demurrer or proper plea had been put in, the plaintiffs could then have amended, or dismissed the suit as to the Burgers, and maintained the suit against Peay alone, on the written guaranty, which is certainly maintainable.

By the act of 1837, ch. 25, § 1, Nich. Sup., p. 225: When the plaintiff is entitled to a judgment against any one of the parties defendants sued, and not against all jointly, he shall have his judgment against the party that is liable.

There can be no question as to Peay's being liable on the guaranty, and that this action is maintainable against him. See Acts of 1852, § 6-7, p. 219.

But it is insisted on the part of the plaintiffs, that the action is maintainable against Peay, as an endorser

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in view of the proof in the cause. The written guaranty was given expressly to render him liable in the same manner as if he had endorsed the note on the back, and the reason assigned by Peay for not putting his name on the back of the note, but giving the written guaranty, was that Burger might not know that he was liable for the note, and that he had refused to endorse it, or Burger might believe so, and in the future give other endorsers than himself to Eakin & Co., to whom he had recommended said Burger as good and solvent. The note was enclosed to Eakin & Co., in the written guaranty, and the guaranty was to be regarded as equivalent to an endorsement, and to render him liable in the same way as if endorsed. If that was the intention of the parties, it should be so regarded by the court. See Story on Promissory Notes, § 121, 460, 464.

W. F. COOPER, for the plaintiffs in error.

1. This court has repeatedly held that the plea of *non-assumpsit*, since the act of 1819, ch. 42, does not put in issue the execution of the note, nor the endorsement unless sworn to. And the court has also held that a plea of no assignment is necessary to put the plaintiff on the proof of his title, where he claims through parties not sued. "The existence of the paper as described in the declaration, is admitted by the plea of *non-assumpsit*, and therefore, its production is not necessary." *Smith vs. McManus*, 7 Yerg., 477-485. The plea in this case admits the cause of action as declared, and no proof, except demand and notice, (which was made,) was required, even against the endorser. The special matter, which the defendant was at liberty to introduce, could only be

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such matter as could properly be brought in under the plea. In this view, the charge may be conceded to be abstractly right upon those counts, upon which the evidence was offered; but the plaintiffs were entitled to recover upon the first count, upon a proper charge by the court. 4 Yerg., 572.

2. Upon the pleadings and proof, the plaintiffs were entitled to recover against Peay alone, if not against the Burgers, and the jury ought to have been so instructed. Act of 1820, ch. 25, § 102.

E. H. EWING, for the defendants, with whom was C. B. DAVIS, who said:

I insist that the plaintiffs cannot maintain this action, and that defendant Peay cannot be regarded as an endorser on the said note, and he was therefore wrongfully included in the action.

1. To render Peay liable as an endorser, his name should appear on the note as an endorser, either on the back or some part of the note, or some paper attached to the note.

2. A guaranty written on a separate piece of paper, is not negotiable, unless it is expressly stated and made so on the face of the guaranty. Story on Promissory Notes, side p. 484.

A guaranty of a bond or note is not negotiable, unless made so by express terms, but is limited to the person to whom made or delivered. *Smith et al. vs. Dickison*, 6 Humph., 261.

The evident object of Peay in refusing to endorse this note to Eakin & Co., and choosing to execute

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a separate instrument, was to avoid a suit jointly with the maker. So this court held in a similar case of *Neely vs. Knoman*, 10 Humph., 290.

If defendant Peay guaranteed the payment of the note to Eakin & Co., it was an absolute undertaking upon his part, that if the note is not paid by the maker and endorser he will pay it, and the remedy of the plaintiff against him is upon the guaranty, in an action of debt, and not as the endorser of the note. *Turly vs. Hodge*, 3 Humph., 73.

McKINNEY, J., delivered the opinion of the court.

This was an action of assumpsit in the circuit court of Cannon. It appears that on the 15th July, 1851, Samuel N. Burger made a promissory note for \$589.19, payable twelve months after date, to the order of A. Burger, at the Union Bank in Nashville. On the back of this note is an assignment in the usual form, to T. T. Peay. On the 1st of August, 1853, Peay sent this note to the plaintiffs enclosed in a letter, which is as follows: "Messrs. Eakin & Co. Dear Sirs: I enclose you, after so long a time, Mr. S. N. Burger's note for \$589.19, which note I consider myself bound for as *per* agreement between us. Yours, respectfully, T. T. Peay." It appears that Peay had previously agreed with the plaintiffs to transfer said note to them by endorsement in the ordinary form, but that considerations arising out of his relations to the Burgers, induced him to prefer rendering himself liable as a guarantor of the note, rather than as endorser, to which the plaintiffs assented. This action is brought jointly against both the Burgers

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and Peay. The declaration contains three counts. The first count charges S. N. Burger as maker, and A. Burger and Peay as endorsers. The second count varies from the first in this, that instead of alleging an endorsement of the note by Peay to the plaintiffs, it charges that he delivered said note to them, with his written guaranty, &c. The third is in substance a count proceeding upon the legal liability of Peay upon the note, arising out of the foregoing instrument of guaranty, which is set out in words. This latter count is certainly very inartificial in its form, and upon that ground might have been demurred to; but no exception was taken to the declaration, or either count thereof, upon any ground. The defendants jointly pleaded *non assumpsit*, upon which issue was joined.

His Honor, the circuit judge, was of opinion, and so instructed the jury, that the plaintiffs could not recover, on the ground of want of interest in the note, or title to sue thereon, as the guaranty was inoperative to vest in them the legal title to the note, although in a proper proceeding, it might be sufficient to make him liable for the amount of said note.

This is certainly a palpable case of misjoinder of parties and of distinct causes of action, and upon common law principles the objection would be available on demurrer, in arrest of judgment, or upon a writ of error, the objection appearing on the face of the declaration. Nor is this a case within the act of 1820, ch. 25, § 2, which provides that, "In all joint actions founded upon contracts, whether debt or case, a discharge of one or more who may be thus jointly sued, shall not prevent a verdict and judgment

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from being rendered against him, her or them, who may be liable." Here, there is no privity between the Burgers and Peay; no joint contract or liability. The liability of the Burgers on the note, as maker and endorser thereof, is wholly separate and distinct from that of Peay, whose name is not upon the note, and who is in no way liable thereon, and whose only liability is created by and rests upon the guaranty. On no principle, therefore, is the joinder of these several parties and liabilities defensible. And but for the act of 1852, ch. 152, this action could not be maintained against either of the defendants. This is a very strong and universal statute of *jeofails*. The sixth section declares that no suit shall be dismissed for want of proper parties, or on account of the form of action, or for want of proper averments in the pleadings, and authorizes the court to change the form of action, and to strike out or insert the names of parties, either plaintiff or defendant, in the writ or pleadings, and to supply all proper averments.

But even under this statute, the present action can not be maintained against the Burgers for want of title in the plaintiffs to the note sued on. Nor are the defendants precluded upon the state of the pleadings, from availing themselves of this objection. It is true, that upon the plea of *non assumpsit*, not verified by affidavit, the maker cannot be permitted to deny the execution of the note, nor the endorser his endorsement thereof. But upon such plea, without oath, either is at liberty to urge, that from the plaintiffs' own showing upon the face of the declaration, they have no legal interest in the note, and consequently can maintain no suit thereon.



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But it seems to us, that under the statute before referred to, the action may be maintained against the defendant, Peay. It is true, the count upon his guaranty is technically defective in its averments; but no exception was taken upon this ground. The guaranty itself, upon which his liability arises, is set forth in the count, and according to established forms of pleading, this is allowable. The instrument, of whatever description, may be stated in the declaration according to its legal effect and operation, or it may be set forth in the words of the instrument; and in the latter case, the court will put the proper construction upon it, and give it its proper legal effect. Chitty on Pleadings, 367, 305, 307.

In this view, the technical objections to the third count are perhaps obviated. But, if this be not so, they constituted no ground under the act of 1852, for defeating the plaintiff's right of recovery, more especially as no exception was taken to the count, either as respects form or substance.

There is no force in the objection in the present case, that no application was made to amend in the circuit court, for the purpose of supplying the proper averments, pursuant to the act of 1852. The general rule in respect to statutes of amendment and *jeofails*, is, that the amendment need not, in point of fact, be made. The benefit of the statute is obtained by the Court's overlooking the exception, or considering the amendment as made. 3 Black. Com., 407. 1 Saunders, 228, n. 1.

The judgment will be reversed, and the cause be remanded.

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Clarksville & Hopkinsville Turnpike Company vs. T. W. Atkinson.

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CLARKSVILLE & HOPKINSVILLE TURNPIKE COMPANY vs. T.  
W. ATKINSON.

1. **TURNPIKE COMPANIES.** *Damages to land. Act of 1850, ch. 72, § 5.* Upon the return into the circuit court of the verdict of a jury appointed under the act of 1850, ch. 72, to assess the damages sustained by the owner of lands through which a turnpike road may be located, under said act, either party have the right to except to such verdict and make good their exceptions by proof before the court. The court is the exclusive trier of such exceptions, and may allow them and order a new jury as before, or disallow them and adopt the verdict of the jury as the judgment of the court. The idea of a jury trial in court is expressly excluded by the act.
2. **SAME.** *Same. How the jury are to proceed.* A jury appointed under the act of 1850, ch. 72, § 5, to assess damages against a turnpike company, as directed in said act, are to determine the sum as damages to be paid, upon a view of the premises; they are to view the facts and determine the case upon the evidence of their own senses, and not upon the evidence of witnesses.
3. **SAME.** *Same. What shall be grounds of exception to report of jury. How matters of exception to be proven.* It is good cause to set aside the verdict of a jury appointed under the act of 1850, ch. 72, § 5, to assess damages against a turnpike company: 1. That the proceedings are irregular. 2. That the verdict is founded upon an erroneous principle. 3. That the damages are excessive. Affidavits of an *ex parte* character in the circuit court in proving or disproving such exceptions, are irregular and unauthorized; the evidence should be governed by the same rules as in other cases, giving the parties an opportunity to apply the test of cross examination.

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FROM MONTGOMERY.

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The plaintiffs in error located their turnpike road through the lands of Atkinson, with whom they could not agree as to the damages thereto. Atkinson applied to the circuit court of Montgomery for the appointment of a jury, as provided for under § 5 of the act of 1850, ch. 72, to assess his damages. The jury was appointed, and reported to the next term that Atkinson

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had sustained damages to the amount of \$420. To this report the company excepted, on the ground that the jury would not hear witnesses on their behalf, and also that the damages were excessive. Affidavits were admitted by the circuit court tending to show the damages excessive and unreasonable—most of them showing that Atkinson's advantages accruing from the location of said road, greatly preponderate over his damages. Counter affidavits were also produced to the effect that said verdict was just and proper. Judge PEPPER presiding, disallowed the exceptions, and adopted the report of the jury as the judgment of the court, from which the company appealed in error to this court.

HENRY and SHACKLEFORD for the company.

KIMBLE for Atkinson.

TOTTEN, J., delivered the opinion of the court.

The said turnpike company surveyed and located its road over a portion of said Atkinson's land, and the parties being unable to agree upon the sum to be paid for the right of way, the said Atkinson instituted this proceeding to have the same assessed by a jury, under the provisions of the act "to authorize the formation of Turnpike Companies," 1850, ch. 72. The act provides (§ 5) that under an order of the circuit court, the sheriff shall summon five disinterested freeholders, "who shall assess the damages of the owner of the land, taking into consideration the advantages of the road to such person." Upon the return of their ver-

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dict, the said court shall render verdict thereon, "unless the same is set aside by the court for good cause shown," and in that event the court shall order a new jury, as before. The verdict of the jury was for \$420, to which defendant excepted, but the exception was disallowed, and judgment rendered for that amount, from which defendant appealed. The defendant, in the circuit court, excepted to the verdict upon two grounds: 1. That his witnesses were not allowed to testify before the jury. 2. That the damages are excessive. The idea of a jury trial *in Court*, is expressly excluded by this act. The jury are to determine the sum as damages to be paid, upon *view of the premises*. They are to view the facts and determine the case, upon the evidence of their own senses, and not upon the evidence of witnesses. In this respect, therefore, there was no error. As to the damages, it seems to us, in view of the facts as they appear in the record, that they are excessive and unjust.

But, is that a cause for setting aside the verdict in a case like this? The act provides that the court may set aside the verdict "for good cause shown."

We think it good cause to set aside the verdict: 1. If the proceedings be irregular. 2. If the verdict be founded upon an erroneous principle, to the prejudice of either party. 3. If the damages be excessive.

The verdict of the jury is required to be returned to the court, and it must there be subject to revision for error in matter of law, or matter of fact. There is no other check upon the rashness and injustice of a verdict, and no other mode prescribed for its correction. As to the *quantum* of damages, certainly great

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weight will be attached to the opinion of the jury, founded upon a view of the premises, and a strong presumption will exist in its favor. This, however, may be repelled by proof before the court, and we think it is repelled, in the present case, and the damages shown to be unreasonable and excessive. The facts stated by a number of witnesses, go strongly to this conclusion, and leave little room to doubt the truth of the fact.

We are satisfied, also, from the evidence adduced by the petitioner in support of the verdict, that the jury have proceeded upon an erroneous principle, in estimating the damages to which the petitioner is entitled. We have stated the rule on this subject, in a case decided at this term, and we now only refer to the case.\* We do not deem it material to go into a discussion upon the merits, as the case will be remanded for a new proceeding.

It is proper to observe, however, that the practice of regarding *ex parte* affidavits as proof on the trial, adopted to some extent in this case, was irregular and unauthorized. We are not aware that such cases require or permit any new rule of evidence. The parties should have an opportunity to apply to the proof the test of a cross examination. The evidence should be governed by the same rule, as in other cases.

The judgment will be reversed and the cause remanded.

Judgment reversed.

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\* Vide *ante*, p. 237.

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John F. Jordan vs. F. A. Polk.

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JOHN F. JORDAN vs. F. A. POLK.

1. **SPECIAL ADMINISTRATION.** *Power of the county courts to appoint.* The county courts of this State may grant letters of limited administration upon the estates of deceased persons. This power existed under the act of 1794, ch. 1, § 47, and is clearly created and defined as to the estates of non-resident decedents, by the acts of 1842, ch. 69 and 165. But such special administration does not prevent a grant of the general administration in a *proper case*, to a different person; and the two administrations may well subsist together.
2. **SAME.** *Rights of next of kin and creditors.* A limited administration, as contemplated by the laws of this State, is not within the letter or spirit of the law prescribing to whom the general administration shall be granted. The next of kin or creditors cannot claim a right to special administration, if occupying an antagonistic relation to those who represent the deceased. So, where the deceased, a non-resident, had no estate in the limits of this State except the subject of a suit which he was prosecuting at the time of his death against his brother, it was no error in the county court to refuse the general or special administration to such brother, and confer the special administration upon an indifferent person.

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FROM MAURY.

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A suit was instituted in chancery at Columbia, by James F. Jordan against John F. Jordan and others. Pending this suit, James F. Jordan, the complainant, died in Texas, of which State he was a citizen. His interest in this suit was the only estate he left within this State. His counsel applied to the county court of Maury for letters of special administration to carry on the suit, and recommended the defendant in error for said appointment, who was neither of kin or a creditor of the deceased. This application was contested by John F. Jordan, one of the defendants in the bill, who claimed the general administration as next of kin to the deceased. The county court refused said appli-

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cation of John F. Jordan, and appointed the defendant in error special administrator to carry on the suit. Jordan appealed to the circuit court, where Judge MARTIN affirmed the action of the county court, whereupon Jordan appealed in error to this court.

M. S. FRIERSON, for the plaintiff in error.

1. The next of kin of an intestate by law, and as a matter of right, is entitled to the administration of the estate. 1 Meigs, 20.

2. The next of kin cannot be deprived of this right unless there are more claimants than one; then the court may elect to whom the administration shall be committed. 1 Meigs' D., 20. Martin & Yerger, 43, 45.

3. But if the applicant is simply opposed by the other next of kin, it would be error in the court to refuse to commit it to the applicant. Martin & Yerger, 43, 45.

4. But they will insist that this is an application for a special administration upon the estate of a non-resident intestate to prosecute a suit, and is not governed by the general law. We deny that the court can appoint any such *special administrator* upon the estate of a non-resident.

1. By the act of 1841, ch. 96, § 1, the county courts of this State are authorized to appoint administrators generally upon the estates of non-resident intestates, without saying to whom.

2. The act of 1842, ch. 165, § 1, declares that letters of administration shall be granted upon the ap-

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plication of any person interested, his or her agent or attorney, showing that the legislature intended to secure the right to the next of kin, as heretofore.

3. The administration should not, as a matter of justice to our own citizens, be a special one; because, if it were, such administrator could not be sued by creditors; and the assets which should be appropriated to the payment of debts would be collected and transferred to a foreign jurisdiction, and domestic creditors sent there to collect their demands, when it might have been done here. 8 Humph., 558.

4. The only remaining objection to appointing the next of kin, is, that he is the debtor of the estate. This is no legal objection, for his indebtedness would be assets of the estate, for which he and his securities would be liable; and this is an answer to the objection.

W. FLIPPIN, for the defendant in error.

There may be several different administrators, general, limited, *pendente lite*, and special. The word special, embraces all other administrators save the three first named. One may be executor for a particular thing. Wentw. on Ex'rs., p. 12; and so it necessarily follows, one may be administrator for a particular thing; for the law in this respect is the same. "And where there is no general representative an administrator or special representative limited to the subject of the suit," may be appointed. See Williams' Ex'rs., vol. 1, p. 328.

We assume the ground that Jordan, upon no principle, could be administrator in this case. He could be neither general or special administrator. Had the court



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appointed him he would have been appointed to prosecute a suit against himself. This was the whole object of administration; and in the language of Mr. Justice Buller, "it is impossible to say a man can sue himself." 1 Williams' Ex'rs., 592, where is cited *Moffett vs. Van Millingen*. 2 Bos. & Pull., 124, note c. 2 Chitty, 339; and *Fitzgerald vs. Boehm*, 6 B. Monroe.

If it be insisted that the court erred in not appointing a *general* instead of a *special* administrator, which is not admitted, still some one should have been offered other than Jordan, and the record does not show that such was the fact. Polk was the only other person offered; he was unexceptionable in every particular, as much as any *next of kin* or *other most lawful friend*, that might have been presented. The court, using its discretionary power, we insist, acted properly in refusing to appoint Jordan general administrator, and in appointing Polk.

McKINNEY, J., delivered the opinion of the court.

This was an appeal from an order of the county court of Maury, granting a limited administration upon the estate of James F. Jordan, who, at the time of his death, was a non-resident.

It appears from the record, that James F. Jordan died intestate in Texas, of which State he was a resident. Previous to and at the time of his death, there was pending in the chancery court at Columbia, in this State, a suit in which he was a complainant, and the plaintiff in error was the principal defendant. The intestate had no other property or assets within this State at the time of his death, or at the time of the

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grant of administration, except the subject matter of said suit. For the sole purpose of prosecuting this suit to a final termination, the counsel of the intestate applied to the county court of Maury, in which county the chancery court in which this suit was pending, held its sessions, to have a limited administration granted upon the intestate's estate, and nominated the defendant in error, who was not of kin to the deceased, nor a creditor of his estate, nor interested in the suit. The plaintiff in error, who is a brother of the intestate, appeared and claimed, as next of kin, to have a general administration upon the estate of the intestate committed to him. But the court refused this application, because he was the principal defendant in said suit, against whom a decree was sought, and had an interest in opposition to that of the representatives and distributees of the intestate's estate; and proceeded to grant a limited or special administration to the defendant in error. An appeal was prosecuted to the circuit court, and the judgment being affirmed, the case is brought here by an appeal in error.

The first error insisted upon, is, in the grant of a limited administration. It seems to be thought that, under our law this is not admissible, and that none other than a general administration can be granted. We do not think so. It is well settled in England, that such limited administration may be granted. The grant may be limited, either to certain specific effects of the deceased, or to a certain specific purpose, as to filing a bill, or carrying on proceedings in chancery. 1 Williams on Ex'rs., (ed. of 1849,) 431. 1 Hagg., 93. 2 Hagg., 62. 3 Philmore, 315.

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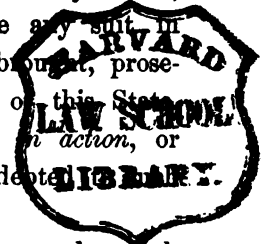
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And it is now well settled, that if such limited administrator is made a party to the suit the estate of the intestate is properly represented, so as to enable the court to proceed in the cause, and a decree obtained against such an administrator will be binding on any general administrator. 1 Williams on Ex'rs, 435. 3 Hare, 199, 208.

But such a limited or special administration does not prevent a grant of the general administration, in a proper case, to a different person. The party entitled to the general grant may take what is called an administration *caterorum*, or an administration of all the other property or assets of the intestate. And the two administrations may well subsist together. 1 Williams on Ex'rs, 431, 436.

It was held in the case of *McNairy vs. Bell*, 6 Yerger, 302, that a limited administration might be granted by the county court. This was allowable under our law prior to the act of 1842, ch. 69, and 165, which expressly authorizes a limited administration upon the estate of a person, who, at the time of his death, was a non-resident, where the decedent left any estate, real or personal, in this State, or where any suit, in which his estate is interested, is to be brought, prosecuted or defended; or where any citizen of this State, or other person, having property, choses in action, or debts due them within this State, was indebted to the decedent at the time of his death.

The authority of the county court to make such limited appointment, is, therefore, placed beyond all question. And in the present case there was no pretence for a general administration, as there was no



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other assets within the jurisdiction of this State. Secondly, it is urged, that, admitting the regularity of a limited grant of administration, the plaintiff in error as next of kin, was entitled to be appointed; and, that, therefore, in the appointment of the defendant, there was error.

This position is equally as untenable as the preceding one. In England, the ecclesiastical courts would not put a litigant party in possession of the property, or subject of the suit, by granting to him a limited administration pending the suit, but to some one presumed to be indifferent. 1 Williams on Ex'rs, 410. Nor, under our law, can either the next of kin, or creditors, claim a right to such appointment, if occupying an antagonistic relation to those who represent the deceased party. A temporary administration of this sort is not within the letter or spirit of the law prescribing to whom the general administration shall be committed; and it would seem singularly absurd to require that such special administration should be granted to a party whose interest, and perhaps whose first act would be to defeat the very purpose of the grant. Such is not the law.

There is no error in the record, and the judgment is affirmed.

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L. W. Fussell vs. Wesley Greenfield.

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## L. W. FUSSELL vs. WESLEY GREENFIELD.

1. MOTION. *Against sheriff for false return. What is a false return in a legal sense.* Act of 1835, ch. 19, § 6. The words "false or insufficient return," as used in our act of 1835, ch. 19, § 6, authorizing the proceeding by motion, have reference alone to the *face of the return*, and in the determination of the question as to whether the return be false or insufficient in the proceeding by motion, nothing extrinsic of the return can be looked to. The inquiry is, is it such in point of law.
2. SAME. *The statutes authorizing the remedy by motion to be strictly construed. Extrinsic evidence of falsity of return.* The provisions of the statutes authorizing the summary remedy by motion against an officer for a false or insufficient return, are cogent and rigorous, and they are not to be extended in their operation beyond what appears to have been the clear intention of the legislature. So in a proceeding by motion for a false return, it is not admissible to show by extrinsic evidence, that such return is false in point of fact. For such purpose the party must resort to his common law remedy of an action on the case.

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FROM DAVIDSON.

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This was a proceeding by motion against the plaintiff in error as sheriff of Davidson in the circuit court of said county for a false return, upon a writ of *venditioni exponas*. Greenfield had sued out an attachment against one Jones, which an officer levied upon certain furniture which he left in the ware room where the levy was made. Upon Greenfield's judgment upon the attachment a *venditioni exponas* issued and came into the hands of Fussell as sheriff, upon which he made this return: "No property found in my county, the property herein described having been removed." No exception was taken to the return on its face, but upon the trial of the motion the parties agreed to submit the question as to the falsity of the return to a jury,

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when evidence was heard tending to show that some of the property described was shown to the sheriff in the possession of another party, and which the officers declined to seize until he could confer with the party having possession, which he afterwards did, and finding that the party in possession claimed the property as his own, he returned the writ as stated above. There was verdict and judgment for Greenfield before the circuit court, Judge BAXTER presiding, from which Fussell appealed in error.

NEIL S. BROWN for the plaintiff in error, cited *Rains vs. Childress*, 2 Humph., 449. *Trigg vs. McDonald*, 2 Humph., 383. *Hamblet vs. Herndon*, 3 Humph., 34. *Hinkle vs. Black*, 2. Ib., 574.

JOHN REID for the defendant in error, cited, 2 Humph., 386. *Greenfield & Snell vs. McGavock*, 2 Swan, 344.

McKINNEY, J., delivered the opinion of the court.

This was a motion for judgment against the plaintiff in error, as sheriff of Davidson county, for a supposed "false" return, on a writ of *venditioni exponas*.

It appears from the record, that on the 5th day of July, 1850, Greenfield, the defendant in error, sued out an attachment, returnable to the circuit court of Davidson, against one Jones, an absconding debtor.

The attachment was placed in the hands of L. E. Temple, a constable, who returned the same on the day of its issuance, levied on several bureaus, and other

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articles of household furniture. The attachment was levied on said furniture, in the ware room of one Woods, in Nashville, and the constable, without taking the same into his possession, or for aught that appears, taking any measures for its safe keeping, suffered it to remain in the ware room. The constable died, and the property levied upon was removed and disposed of, but when or how, does not appear. At the January Term, 1851, of the circuit court of Davidson, Greenfield recovered judgment on the attachment against Jones for \$170. On the 14th of July, 1852, the writ of *venditioni exponas* in question issued, which was returned in proper time *nulla bona* to which was added "the property herein described being removed."

No exception is taken to the return *upon its face*. The ground of the motion is, that in *point of fact*, it is at least partially untrue. On the hearing of the motion, by agreement of parties, a jury was empannelled to try the question of fact, and on the trial the plaintiff introduced a witness, who in substance stated that he had seen the furniture upon which the attachment was levied at the store room of Woods in Nashville, and that he afterwards saw one of the bureaux, and some other articles of furniture, which he believed to be *part* of the same furniture seen at the store room of Woods, and levied on by the constable, in the possession of Dr. Warne in Nashville. The witness further stated that he went with Hyde, the deputy sheriff, in whose hands the writ of *venditioni exponas* had been placed, to the house of Dr. Warne, for the purpose of pointing out the furniture upon which Greenfield's attachment had been levied, that the officer

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might seize and sell the same, but that he did not go into Dr. Warne's house; the officer, however, did enter the passage of the house, but finding that the Doctor was absent, he declined to seize the property, and said he would go to the office of Dr. Warne and notify him of the intended levy. He and witness accordingly went to the Doctor's office, who upon being informed of the purpose of the officer, replied that the furniture in his house was his own, and that he would permit no one to levy upon it, and that if any one entered his house for such purpose, it would be at his peril.

This is substantially the evidence submitted to the jury, upon which they found that the sheriff's return was *false*, and the court adopted the verdict and rendered judgment against the sheriff and his sureties for the amount of Greenfield's judgment, with twelve and one-half per cent damages, from which judgment an appeal in error was prosecuted to this court.

We are not called upon in this case to express any opinion upon the question, whether or not, upon the foregoing facts, the plaintiff would be entitled to maintain an action on the case at common law, against the sheriff for a *false return*, nor do we deem it proper to do so. Be this as it may, however, we are of opinion that he is not entitled to maintain the present motion, under the act of 1835, ch. 19, § 6. In the application of that statute to a case like the present, its proper meaning and construction have been altogether misapprehended.

The argument in support of the judgment of the circuit court assumes that this proceeding by motion



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was intended to be a substitute for, or at least a concurrent remedy with the common law action on the case for a *false return*. If this were so, the conclusion would be inevitable, that upon whatever state of facts an action on the case might be supported, a motion may be likewise maintained, at the election of the party. But this construction would draw after it, consequences which, in our view, forbid its adoption. The provisions of the statute are most cogent and rigorous, and therefore their application is not to be extended beyond what appears to have been the clear intention of the Legislature. But more than this, we are not to suppose that it was the intention of the legislature to take away the right of trial by jury, in a class of cases involving numerous questions of official duty and integrity, of conflicting titles and right of property, and other perplexing questions of fact, which in the theory of our law, are especially appropriate to that mode of trial. Neither ought we readily to adopt the conclusion that it was intended to change the common law rule of damages in this class of cases, so that instead of subjecting the officer to liability commensurate with the damages sustained by his wrongful act, he and his sureties should by a positive rule, alike arbitrary and indiscriminate, be made liable for the full amount of the judgment, with a penalty of twelve and a half per cent thereon; and yet all these consequences necessarily result from the construction insisted upon by the counsel for the defendant in error. Such a construction could only be admitted, constitutional objections out of view, upon the ground that the statute was susceptible of none other.

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It is clear that in neither of these cases, provided for in the section of the act before referred to, has the court any authority to empanel a jury; no such thing was contemplated, and upon what we consider the proper construction and interpretation of the language of the act, there can be no necessity in calling in the aid of a jury; because the questions, if not purely questions of law, relate to matters of practice, which, both upon principle and established usage, are proper for the determination of the court exclusively, and altogether unfit for a jury.

The cases provided for, are, first, the failure of the sheriff, or other officer, "to make due and proper return of any execution." Second: his failure "to pay over the money on any execution after the same is, or shall be returned, satisfied in whole or in part." And, third, his "making a false, or insufficient return."

In these cases the act declares that the "officer and his securities shall be liable to a motion in the circuit court of the county from which the execution issued; and judgment shall be rendered against them for the amount due upon said execution, or for the amount collected by such sheriff, &c., with interest thereon, together with twelve and a half per cent damages."

Now, as respects the default of the officer in the two first cases, the non-return of an execution, or the neglect to pay over money received upon an execution, the courts have immemorially exercised the power of coercing the officer to the performance of his official duty by process of contempt or other summary method; and in conferring the power to render a judgment on

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L. W. Fussell vs. Wesley Greenfield.

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motion in these cases, all admit the propriety of the exclusive exercise of that power by the court.

In respect to the motion for a "false or insufficient" return, it becomes necessary to determine the legal interpretation of these words, or the sense in which they are to be understood, as used in the statute under consideration. We think it clear that they have reference alone to the *face of the return*, and in the determination of the question, whether the return be false or insufficient, nothing extrinsic of the return can be looked to. As to an alleged insufficient return, the enquiry is, is it such in point of law? It was so held in *Rains vs. Childress*, 2 Humph., R., 449. In that case it is said: "If the return be not insufficient in point of law, that is, if it show an adequate reason why the money was not made, a motion will not lie; if it be thought, notwithstanding his return, that the sheriff has not used proper diligence, or that he has been guilty of negligence, the remedy is by action." This reasoning, we think, applies with equal force to the case of a motion for a false return. The enquiry in the latter case, is, can it be affirmed, as a legal conclusion from the facts stated in the return, that it is false? For example, suppose the return shows a levy upon personal property, but it is stated, as is sometimes the case, that there was not time to sell, and yet it appears from the date endorsed on the execution, that ten days or more elapsed between the levy and the return day of the process; in such case, the court can pronounce upon the face of the return that it is false; and so in other cases that sometimes occur. To such cases alone, was this provision of the act intended to

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Hobbs & Henly, *use &c.* vs. Memphis Ins. Company.

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apply. And therefore we hold, that in a proceeding by motion for a "false return," it is not admissible to show by extrinsic evidence, that such return is false in point of fact. For this purpose the party must resort to the common law remedy of an *action on the case*.

We are aware that the case of *Trigg vs. McDonald*, 2 Humph., R., 386, seems to sustain the contrary doctrine; but the question as to the proper construction of the act of 1835, does not appear to have been directly made in that case, and we are not satisfied with the decision.

It follows that the judgment must be reversed, and the motion dismissed.

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HOBBS & HENLY, *use &c.* vs. MEMPHIS INS. COMPANY.

1. **INSURANCE.** *Assignment of policy.* The title of the subject of the policy remaining in the assignor. Although a policy of insurance is not negotiable, and the assignment of it does not pass the legal title to the assignee, yet it is a *chase in action* assignable in equity, and this equitable interest will be recognised and protected as in other cases, where *choses in action* are assigned. But such assignment will be of no value to the assignee, unless the subject insured or an interest therein be also assigned.
2. **SAME.** *Action upon assigned policy.* The action at common law upon a policy of insurance in the hands of an assignee, can only be maintained in the name of the legal owner, the assignor, for the use of the equitable owner, the assignee, and the insurer will be entitled to all defenses as set off or otherwise, that exist in his favor against the original assured.
3. **SAME.** *Sale of the subject of the policy.* As affecting the policy. A sale of the subject insured, does not operate as an assignment of the policy. So

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Hobbs & Henly, *use &c.* vs. Memphis Ins. Company.

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if the subject insured be assigned, and not the policy also ; and a loss happen, neither the original assured or the assignee of the property can recover indemnity of the underwriters.

4. SAME. *Same. Same.* If the party assured under a policy which contains a provision that it shall become void by assignment, without the consent of the underwriters, make a voluntary assignment of his entire interest in the *property insured*, he cannot without such consent, also assign the policy so as to continue the risk upon the underwriters ; but the risk will cease, unless the property insured be reassigned during the time limited for the continuance of the policy.
5. SAME. *Effect of an assignment of part of the property insured. Illustration of the rule.* If a part only of the property insured be assigned, the risk will continue upon the insurers as to the residue. So where two partners in trade took insurance upon their stock of goods, and during the continuance of the policy, one of said partners sold and assigned his interest in the stock of goods to the other, the risk continues as to the interest of the assignee in the goods which he owned at the time of the insurance, and he may recover in an action brought in the name of the firm, for his use and loss of his original interest, but not for a loss to the interest of his co-partner so assigned to him, for that has ceased to be covered by the policy.

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FROM DAVIDSON.

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This suit was instituted in the circuit court of Davidson, by Hobbs & Henly for the use of Henly, upon a policy of insurance against loss by fire, effected with the Memphis Insurance Company. It seems that on the 9th of January, 1852, the defendants insured Hobbs & Henly, then partners in trade under the firm name, to the amount of \$3,000, upon their stock of groceries, then kept in their front store-room fronting Market street and Sewanee alley, in the city of Nashville. The insurance was to continue for one year. On the 1st of April, thereafter, Hobbs sold his interest in the goods to Henly. On the 12th of June, 1852, the groceries were destroyed by fire, and this action was brought in the name of Hobbs & Henly for the use of Henly, for the whole

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Hobbs & Henly, *use &c.* vs. Memphis Ins. Company.

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amount of insurance. There is a provision in the policy that it should not be assigned by the assured, without the consent of the company, "expressed by endorsement thereon," and "in case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of such policy, shall thenceforth cease." The defendant pleaded the sale by Hobbs to Henly on the 1st of April, 1852, and that Hobbs had no interest in the policy. The plaintiffs replied that the defendant after the sale by Hobbs, had notice thereof and assented thereto. To this replication there was a demurrer, which the court (Hon. N. BAXTER presiding) sustained, giving judgment thereon for defendant, from which the plaintiff appealed.

MEIGS, for the plaintiff in error.

The action having been first in the name of Hobbs & Henly for the use of Henly, the question is made, whether the action will lie, Hobbs having, as is said, no interest in the property? For the plaintiffs it is answered, that the sale of Hobbs' interest to his partner is not a formal assignment of the policy, but only vests Henly with the beneficial interest in what previously belonged to the firm, with a right to use the firm's name in a suit on the policy. Meigs' Dig., 1402, last ¶; 141; also 28.

In 8 Annual Dig., p. 228, No. 26, is an abstract of *Howard vs. Albany Insurance Co.*, 3 Denio, 301, to this effect; that, if one of two owners of property insured conveys his interest to the other, and the property is destroyed by fire, a joint action cannot be maintained.

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Hobbs & Henly, *use &c. vs. Memphis Ins. Company.*

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So in 5 U. S. Dig., p. 202, I 6, the case of *Wilson vs. Hill*, 3 Metc., 66, is cited as settling, that if a person insured parts with his interest in the property before lost, the benefit of the insurance does not go to the purchaser. But 3 Kent, last ed., p. 452, note 1, and 453, note a, 2 (top paging) 7 Barb. S. C. R., 570, is cited, to the effect, that "a sale by one of several owners to the other owners is not such an alienation as will avoid the policy." That is the point of chief interest. All the rest relates merely to the form of suing.

A sale of the subject is an equitable assignment of the vendor's interest in the policy. Phillips on Insurance, ch. 1, § 10, sub-section 76-108. As to the mode of proceeding, sub-section, 82.

A. EWING, with whom was RUSSELL HOUSTON, for defendants in error, who said :

1. There can be no doubt, that there must be a subsisting interest in the plaintiffs, at the time of the loss in suits of this kind, in order to give any claim against underwriters for indemnity. 1. Phillips on Ins., 2 ed., p. 421. This suit is brought in the name of Hobbs & Henly. It cannot be sustained in their names, because Hobbs has no interest in the policy, and no interest in the subject matter of the suit. In 1 Phillips on Ins., p. 62-63, it is said, "that if property insured is sold, so that the insured retains no interest in it, and is subject to no risk or responsibility on account of it, and no assignment or agreement for the assignment of the policy is made, and afterwards a loss happens, and after the loss the policy is assigned to the vendee, the assignment

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Hobbs & Henly, *use etc. vs. Memphis Ins. Company.*

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will be ineffectual in respect to such loss, and neither the party originally insured nor his assignee, can recover the loss; the original assured can recover nothing, for, not being the owner of the property at the time of the loss, he has sustained no injury; nor can the assignee recover anything, because, at the time of the loss, he was not the party insured."

2. This is a stronger case against the plaintiffs, because there never was any assignment of the policy, either before or after the loss. If the property had never been assigned, and the policy had been legally assigned after the loss, this suit might possibly be sustained, but such was not the fact.

3. The foregoing propositions clearly apply where all of the assured, have assigned their interest in the property insured before a loss, to a stranger.

4. And the same doctrines and principles apply to a case when two or more persons are jointly insured upon joint property, and one of them, before the loss, assigns all of his interest in the subject of the insurance to the other. 3 Denio's Rep., 301. 2 Comstock's R., 210.

5. This suit is on the policy. It cannot be sustained by both, for the reasons stated. It cannot be sustained by Henly alone on the policy, for the policy was for the benefit of two. And if this suit is to be regarded as Henly's suit, being for his use, it cannot be sustained. The replication alleges notice of the sale to Henly, and the assent to it by the company. If such facts give Henly a right of action against the Company, it would be because of a new contract, upon which the suit should have been brought, and not upon the policy. *Wilson vs. Hill*, 3 Metcalf, 66.



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Hobbs & Henley *vs.* &c. *vs.* Memphis Ins. Company.

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TOTTEN, J., delivered the opinion of the court.

Action on a fire policy. On the 9th of January 1852, the defendant insured the plaintiffs, *Hobbs and Henley*, against loss and damage by fire, to the amount of three thousand dollars, upon the plaintiffs stock of groceries, in the store room then occupied by them in Nashville, the policy to continue one year.

It was provided in the policy that it was not assignable unless by defendants' consent, expressed by endorsement made thereon, and if assigned in whole or in part without such consent, the liability of defendants was to cease. After the insurance was effected, Hobbs assigned all his interest in the *subject* insured to Henley, his partner, and thereafter, on the 12th of June 1852, the store room and groceries insured were consumed by fire, to the loss and damage of the plaintiff, six thousand six hundred dollars. The defendant refused to pay the indemnity stipulated for in the policy, and this action was instituted in the name of Hobbs and Henley for the use of Henley, to recover it. To the defendants' plea that Hobbs had assigned his interest in the subject insured to Henley, the plaintiffs replied that the assignment was by defendants' consent. To this replication defendants demurred; on which there was judgment for defendants, and plaintiffs appealed.

Counsel for defendant insist that there must be a subsisting interest in the plaintiffs at the time of the loss, to entitle them to maintain a suit against the insurer for the indemnity stipulated for in the policy. That there was no subsisting interest in Hobbs, one of the plaintiffs, as he had assigned his interest in the subject

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Hobbs & Henley *vs. &c.* vs. Memphis Ins. Company.

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insured to Henley, the other plaintiff, and therefore the action cannot be maintained in their joint names.

It is further argued, that said assignment avoided the policy under a provision contained in it to that effect, and that the risk of defendant therefore ceased. Now a policy of insurance is *not negotiable*, and an assignment of it will not pass the legal title to the assignee. But it is a *chose in action* assignable in equity, and this equitable interest will be recognised and protected as in other cases where *choses in action* are assigned. The action at common law must be in the name of the assignor, the legal owner, for the use of the assignee, the equitable owner, and the insurer will be entitled to all defenses, as set-off, or otherwise, that exist in his favor, against the original assured. 4 Kent Com., 261, 375. 1 Phil. on Ins., 61. But the assignment will be of no value to the assignee unless the subject insured or an interest therein be also assigned. 3 Kent Com., 375. And, therefore, if the subject insured be assigned, and not the policy also, and a loss happen, neither the original assured, nor the assignee of the property can recover indemnity from the underwriter, the former not being owner of the property, has sustained no loss, and the latter had acquired no interest in the policy, for a sale of the subject insured does not operate as an assignment of the policy. 1 Phil. on Ins., 62. But in the present case the policy contains a provision against its assignment, unless it be with the consent of the insurer.

A restriction in a policy that it shall become void by assignment without the consent of the underwriters, is not void as an unlawful restraint upon the transfer of property, *but is to be strictly construed*, 1 Phil. on Ins.,

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Hobbs & Henley *vs.* *etc.* *vs.* Memphis Ins. Company.

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73. 5 Pick. R., 75. And being so construed, the restriction does not apply to a transfer by act of law, nor to a transfer to a trustee for the benefit of the assured and his creditors, nor to a transfer by will. 3 Kent Com., 375. 1 Phil. on Ins., 74. But if the assured make a voluntary assignment of his entire interest in the *subject insured*, he cannot, also, under this provision assign the policy so as to continue the risk upon the underwriters; but the risk will cease, unless the subject insured be re-assigned during the term limited for the continuance of the policy, and in that case it may perhaps revive. The assignment of the property insured does not render the policy void, but it leaves no interest in the assured upon which it can operate. But if a part only of the property be assigned, the risk will continue upon the insurers as to the residue; for in such case, the risk is less than that which the contract imposed. As to this there can be no question. Now if two persons insure property and one assign his interest to the other, can the rule be different? We are of opinion that it cannot. In principle the cases are the same. But the assignee cannot recover for a loss of interest *assigned* to him, for that has ceased to be covered by the policy. But there can be no reason why he may not recover for a loss of the residue, which he owned at the time of the insurance and at the time of the loss.

It is true as argued, that the assured must have an interest at the time of the loss, and his recovery will be limited by the extent of that interest and loss. If part of the subject insured be assigned, there can be no recovery for that, but only for the residue as we have seen. *Reed vs. Cole.* 3 Burr, 1512. *Stetson vs. Mass. Ins. Co.*

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Hobbs & Henley *vs.* Memphis Ins. Company.

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4 Mass. 330. Now as to the remedy, we think it clear that the action must be in the name of both the plaintiffs, for in them the legal interest is vested. We have seen that the policy is a mere *chose in action*, and where there is no prohibition against its assignment, the assignee takes only an equitable interest, and his remedy must be in the name of the legal owner. In the present case there is an assignment of part only of the subject insured, and for the loss of that the action must be in the name of both the assured. If the underwriters did not consent to the assignment, the recovery will be limited as we have seen, to the loss of the residue of the property insured, which had not been assigned. But if the underwriter consented to the assignment, and that the policy should continue as before, the right to recover would extend to the property assigned also, for that would be a waiver of the prohibition contained in the policy. The consent to be expressed according to the terms of the prohibition, by endorsement on the policy.

The cases of *Murdock vs. Chenango Mutual Insurance Company*, 2 Comstock R., 216, and *Howard vs. Albany Ins. Co.*, 3 Denio R., 302, relied upon by defendants' counsel, we have carefully considered, and we deem it necessary only to say, that we do not concur in the doctrine of those cases, nor consider it founded in principle or authority.

Let the judgment be reversed, and the cause be remanded.

Judgment reversed.

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Sarah Cooper vs. J. W. Summers.

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SARAH COOPER vs. J. W. SUMMERS.

1. **APPEAL.** *County court. Inquisition of lunacy. Act of 1844, ch. 99.* The act of 1844, ch. 99, § 1, which provides, that, "where any person or persons may conceive him, her, or themselves aggrieved by any decree or decision of any county court in this State, he, she, or they may ask for and obtain an appeal from the decision or judgment of said county court to the next circuit court of said county," authorizes an appeal from the decision of a county court to the circuit court, on an inquisition of lunacy. Upon the return of the inquisition the county court must either receive or reject the same; and from its decree or decision, be it either way, an appeal will lie by the express terms of said act.
2. **SAME.** *Same. Same.* An order of the county court upon the return of an inquisition of lunacy, that the same be received and entered upon the records, is such an order or decision as an appeal will lie from to the circuit court.
3. **SAME.** *Effect of an appeal. Jurisdiction of the circuit courts.* The appeal given by the act of 1844, ch. 99, § 1, from the decision of a county court to the circuit court on an inquisition of lunacy, can only operate as an appeal in error, or writ of error proper. Upon such appeal the circuit court can only *revise* the proceedings of the county court, and affirm or reverse the same as may be proper. Upon a judgment of reversal the circuit court has no jurisdiction, either to award a writ of inquisition to the sheriff *de novo*, or to empanel a jury to enquire into the fact of lunacy. This jurisdiction is exclusively in the county court.
4. **PRACTICE.** *The remedy by certiorari.* In cases where no appeal or writ of error is given by statute, the writ of *certiorari* has been adopted in our practice as the almost universal method by which the circuit court, as a court of general jurisdiction, exercises control over all inferior jurisdictions, however constituted, and whatever their course of proceeding.
5. **COUNTY COURTS.** *Jurisdiction.* The act of 1797, ch. 41, § 1, conferring upon the county courts jurisdiction over the estates and persons of idiots and lunatics, does not extend to persons disabled by age or bodily infirmity. Such jurisdiction belongs to the chancery courts by the act of 1852, ch. 163, by which the chancery courts have also concurrent jurisdiction with the county courts over the persons and estates of idiots and lunatics.

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FROM CANNON.

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This was a proceeding upon an inquisition of lunacy in the county court of Cannon, where it was instituted on the ground that Sarah Cooper, the plaintiff in error,

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was old and infirm, and for the want of the proper exercise of her mind and memory, liable to be cheated, and incapable of managing her estate; this was substantially the report of the jury of inquest, which was received by the county court and ordered to be entered upon the record; but no guardian was appointed. Sarah Cooper appealed from the decision of the county court to the circuit court of said county. A motion was made by the counsel of the defendant in error, who was the original petitioner, to strike the cause from the docket of the circuit court for want of jurisdiction, which was overruled. The defendant's counsel then moved the court to affirm the proceedings of the county court. His Honor, Judge DAVIDSON, being of opinion that he could only examine the case as upon writ of error and not *de novo*, affirmed the proceedings of the county court without further order. From the judgment of the circuit court Sarah Cooper appealed in error to this court.

E. H. EWING and A. BURGER, for the plaintiff in error.

KEEBLE and DAVIS, for the defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an inquisition of lunacy. The ground of the proceeding, as set forth in the petition to the county court, is, that Sarah Cooper, "from sickness and old age, is entirely incapable of taking care of herself, and for want of the proper exercise of her mind and memory,

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is liable to be cheated and defrauded out of her property," &c. The petition shows that said Sarah is the owner of four slaves and other personal property, and that she is seventy-five years of age. Upon this application the county court made an order, directing the sheriff to summon a jury of twelve freeholders to ascertain the lunacy of said Sarah Cooper. The jury found that she was a lunatic. The inquisition was received by the court, and ordered to be entered of record, but no guardian was appointed.

On behalf of the supposed lunatic, an appeal was prosecuted to the circuit court. In the circuit court a motion was made by the counsel of Summers, to strike the case from the docket upon the ground that an appeal would not lie in such a case. The court refused this motion, and proceeded to affirm the proceedings of the jury and of the county court, and the case is brought here by an appeal in error.

The first and principal question for our consideration, is, will an appeal lie in a case like the present? This question was incidentally considered and decided in the affirmative in the case of *Thomason vs. Kerchival*, 10 Humph., 322. Under the act of 1844, ch. 99, the question is free from all doubt. By the provisions of that act, when any person may conceive himself "aggrieved by any decree or decision of any county court in this State," it shall be lawful for such person "to ask for and obtain an appeal from the decision or judgment of said county court to the circuit court," &c. Upon the return of an inquisition of lunacy the county court must act; it must either receive or reject the inquisition; and from its "decree or decision," be it either

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way, an appeal will lie by the express terms of the act.

In the present case, the record shows that the inquisition was received by the court, and ordered to be entered upon its records. This was such an order, or "decision," as an appeal would lie from to the circuit court. It is certainly true that upon common law principles an appeal would not be maintainable in the present case, neither would a writ of error. The jurisdiction conferred upon the county court by the act of 1797, ch. 41, § 1, over the persons and estates of "idiots and lunatics," being a special jurisdiction, created and regulated by the statute, and not a jurisdiction properly belonging to the court as a court of record, proceeding according to the course of the common law, no appeal or writ of error could be maintained from the sentence or judgment of the court, in the exercise of such special statutory jurisdiction, in the absence of an express provision to that effect. The remedy would be, (if no appeal or writ of error were given by statute,) the writ of *certiorari*, which has been adopted in our practice as the almost universal method by which the circuit court, as a court of general jurisdiction, exercises control over all inferior jurisdictions, however constituted and whatever their course of proceeding. 11 Humph., 249, 252. But in the present case, the appeal given by statute can only operate as an appeal in error, or writ of error proper. Upon such appeal the circuit court can only *revise* the proceedings of the county court, and affirm, or reverse and set aside the same as may be proper.

Upon a judgment of reversal the circuit court has no jurisdiction, either to empanel a jury to enquire



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into the fact of lunacy, or to award a writ of inquisition to the sheriff *de novo*. This jurisdiction is exclusively in the county court.

The entire proceedings in the present case are erroneous, and ought to have been quashed for various reasons; but chiefly upon the ground that the case stated in the petition was not within the jurisdiction conferred upon the county court by the act of 1797. That jurisdiction is limited to "idiots and lunatics," and does not extend to persons disabled by *sickness or age*, from taking care of themselves, or their estates. The act of 1852, ch. 163, has very wisely given the chancery court concurrent jurisdiction with the county court, over the persons and estates of idiots and lunatics, and has extended the jurisdiction of the chancery courts to all "other persons of unsound mind."

The judgment of the circuit court will be reversed, and the entire proceedings of the county court, including the inquisition of the jury, will be set aside and quashed.

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J. J. Tompkins vs. F. H. Wisener.

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J. J. TOMPKINS vs. F. H. WISENER.

1. SLANDER. *Evidence. Opinions of witnesses.* In an action of slander where the declaration by proper averments, states the existence of certain extrinsic matter to explain the meaning and application of the words spoken and show their defamatory character, such averments being substantive allegations of fact, must be proved, and in such case it is competent when the words are proven, to admit as evidence to the jury the understanding of witnesses, familiar with such extrinsic facts, in whose presence the words were uttered, as to their application. *Vide 1 Starkie on Slander, 44. 2 Ib., 320.*
2. SAME. *Same. Mere inference of witness as to application of words.* The mere general opinion of a witness derived from reading a libel, or hearing the words spoken, unaided by any circumstances within his knowledge, or accompanying the act, is not competent evidence. But his understanding as to the meaning of the words, and their application to the plaintiff when founded on facts previously known to him, and detailed by him as the foundation of such understanding, is not subject to just exception, and is competent to go to the jury, who may adopt or reject it as in their judgment it is well or ill-founded.
3. SAME. *Same. Illustration of the rule.* In actions of slander, it is the sense and application of the words spoken, as *understood by the hearers*, which caused the damage and constitutes the very gist of the action. So, where the words spoken were, "there goes the grocery keeper who stole my money," and the witness saw no one passing at the moment except the plaintiff, and was aware (as he stated,) of a difficulty which some time before occurred between the plaintiff and defendant, in which the plaintiff, who had kept grocery for the defendant, was charged by him with embezzling his money, it was competent to allow said witness to state his opinion as to the application of the words.
4. SAME. *Same. Imputation of crime by insinuation.* It is not absolutely essential in order to ground an action of slander, that the defamatory words should *carry on their face* an open and direct imputation of crime, as the nature of the imputation may, from extrinsic matter, be perfectly well understood by the hearers acquainted with the persons and circumstances.

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FROM OVERTON.

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The defendant in error brought this action of slander against the plaintiff in error in the circuit court of Overton. The words spoken were, "there goes the

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grocery keeper that stole my money." The witness who heard the words uttered, was asked his opinion as to whom the words referred. This was objected to, but the court, Judge GOODALL presiding, overruled the objection, and permitted the question to be answered. The witness stated that "at the moment the words were spoken he had no opinion, but on looking around he saw no one passing but Wisener, and recollecting a difficulty which occurred about one year before between the parties, in which Tompkins charged Wisener, who had kept his grocery, with receiving money, and not accounting therefor, he supposed the words were intended to mean Wisener. This extrinsic fact had also appeared in proof, before the witness was interrogated as to his opinion. The declaration contains four counts, variously charging the words spoken, but containing no averment as to the existence of the extrinsic matter referred to as the foundation of the witnesses opinion. There was verdict and judgment for \$100 for the plaintiff below, and the defendant's motion in arrest and for a new trial being made and overruled, he appealed in error to this court.

GOODPASTURE and BRIEN for Wisener.

GARDENHIRE and JONES for Tompkins.

McKINNEY, J., delivered the opinion of the court.

This was an action of slander. Verdict and judgment were for the plaintiff, and an appeal in error to this court. The words alleged in the declaration, and

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proved to have been spoken, are, "there goes the grocery keeper that stole my money." In uttering these words, the defendant mentioned no name, nor did he in terms refer to any particular person. Circumstances detailed in the evidence are relied upon, however, to show that the plaintiff was the person meant. A witness present at the time the words were spoken states that immediately afterwards he looked around and saw the plaintiff crossing the public square, about twenty or thirty feet from where defendant and witness were standing, and that he did not see any one else about or passing. It was also proved that about a year before the speaking of the words, the plaintiff was employed in keeping the defendant's grocery; that they had had some difference, and defendant had charged that the plaintiff had used his money while keeping the grocery, and had not accounted for it. The plaintiff's counsel in the examination of one of plaintiff's witnesses, enquired of him "who he understood him (the defendant,) to mean," as the person charged with stealing the money. This question was objected to, but the objection being overruled, the witness in substance stated, that at the time the words were first spoken, "he had no opinion" on the subject, but after some reflection, and calling up the circumstances before referred to, he "thought it was plaintiff defendant meant." This question and answer constitute the ground of error relied upon in the argument here.

It is certainly true that the slanderous words spoken must be shown to have an individual application to the plaintiff, and that he was the person intended to be designated. It is not absolutely essential, however, that

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in order to ground an action for slander, the defamatory words should carry on their face an open and direct imputation of crime, or that they should designate by name the person at whom they are pointed; for as has been justly remarked, calumny may be as effectually conveyed in artful allusions to collateral matter and oblique insinuations, as by the most explicit assertions; and though a fictitious name be used, or the name be altogether omitted, the application of the words, both as respects the nature of the imputation and the person intended, may from extrinsic matter, be perfectly well understood by the hearers acquainted with the persons and circumstances. Starkie on Slander, (ed. of 1852,) vol. 1, 44; vol. 2, 320, marg. "In such case, the plaintiff, by proper averments in the declaration, as has been done in the present case, must state the existence of such extrinsic matter as will explain the meaning of the words, show their defamatory character, and their application to the plaintiff." "It is competent to aver that the words were uttered with intent to convey a particular meaning, that they were intended to apply to the plaintiff, and that they were so understood by the persons in whose presence they were spoken." "And these averments being substantial allegations of facts, must be proved. 5 East, 463-470. 5 Barn. & Adol., 27, and are questions to be decided by the jury. Starkie on Slander, vol. 2, 51."

Having stated these general principles, we come to the question whether, if the defendant does not at the time of speaking the words, directly apply them to the plaintiff by name, it is competent to admit as evidence to the jury the understanding of witnesses in whose

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presence they were uttered, as to their application?

Upon this question the authorities appear to differ. According to some of the cases, both English and American, it would seem that in support of the averments of the declaration in respect to the meaning of the words, or of their application to the plaintiff, the opinion or belief of a witness cannot be admitted; that the witness can only be allowed to state facts, from which the jury, under the direction of the court, will deduce the proper conclusions for themselves.

But it is laid down on the other hand (Starkie on Slander, vol. 2, 51,) that the libel or words spoken, being proved, their application to the plaintiff and the extrinsic matters alleged in the declaration may be shown "by the testimony of witnesses who know the parties, and circumstances, and who can state their judgment and opinion on the application and meaning of the terms used by the defendant as alleged in the declaration." Again at page 321, marg., it is said that where the intention as to the application of a libel, is "doubtful and ambiguous, from the defendant having left blanks for the name, or from his having given merely the initials, or having introduced fictitious names, it is a question for the opinion and judgment of the jury, whether the prosecutor was the party really aimed at. For this purpose the judgment and opinion of witnesses who from their knowledge of the parties and circumstances, are able to form a conclusion as to the defendant's intention and application of the libel, is evidence for the information of the jury."

There is certainly much force in the objection, that the mere general opinion or understanding of a witness

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derived from simply reading a libel, or hearing the words uttered, unaided by any circumstances within his knowledge, or accompanying the act, ought not to be received as evidence to the jury; for this might be in effect to make the result depend, not upon the proper inferences to be drawn in view of all the circumstances, but possibly upon the mistaken deductions of the witness. But the understanding of a witness as to the meaning of words, or of their application to the plaintiff, derived from accompanying circumstances, or facts previously known to him, and detailed by him as to the ground of such understanding, we think, is subject to no just exception. Of course, the correctness of his conclusions is a matter for the consideration of the jury, and they will adopt or reject them, as in their own judgment they may be well or ill-founded. From the very nature of the case, witnesses must be permitted, under proper qualifications, to state their understanding and conclusion, as well in regard to the sense in which the words were used as to their application; for it is the sense and application of the words, *as understood by the hearers*, which caused the damage, and constituted the very *gist* of the action.

From this view it results, that there is no error in the record, and the judgment is affirmed.

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David Broddie *vs.* W. B. Johnson.

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DAVID BRODDIE *vs.* W. B. JOHNSON.

- I. ASSUMPSIT. *Contract. Consideration.* Where a contract for rent is made with A, and the tenant promises to make his payment to B, such promise to B. is void for want of consideration, unless it appears that he were entitled to receive the rents on the contract of A.
2. STATUTE OF LIMITATIONS. *Debt barred by. What kind of promise will remove the bar.* A promise to have the effect to revive a debt barred by the statute of limitations, need not admit that a specific sum is due, but there must be a promise to pay something or an acknowledgment that something is due in reference to a particular subject matter. If there be no express promise, but a promise to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. *Bell vs. Morrison.* 1 *Peters* 362.
3. SAME. An agreement to submit the matters in dispute to a third party, and to pay whatever such third party may find to be due, is not such a promise as will make the party liable for a debt barred by the statute of limitations.
4. SAME. *Conditional promise. Example.* To say "if I owe you any thing I will pay you"—or, "I do not owe you any thing, but I will refer the matter to A. B. and if he says I owe you, I will pay," does not revive a debt if one in fact did exist, because the promise or acknowledgment is conditional not only as to the amount, but as to any indebtedness at all. But to say "I admit I am indebted to you," in reference to a certain matter, "but not to the extent you claim, and will leave it to A B and will pay the amount when thus ascertained," would be sufficient.

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FROM MONTGOMERY.

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This was an action of debt for rent upon a letting by *parol*, instituted on the 19th of April, 1850, in the circuit court of Montgomery. The defendant plead *nil debet* and the statute of limitations. It appears that Broddie in the year 1840 or 1841, took possession of a tract of land in the county of Montgomery, under a contract with L. W. King and as his tenant. King claimed title to the land, and Broddie remained in possession about two years. Some years afterwards Johnson claimed



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the rents. Broddie alleged, that by the contract with King, he was to pay the rents by making improvements on the place, which he had done to an amount exceeding the rents in value. Johnson and Broddie agreed to refer the matter to McClure, who should decide "whether Broddie should pay any money?" The parties neglected to appear and make proof, and McClure made no award. After this suit was brought by Johnson against Broddie, the latter stated to McClure, that, "if Johnson would take the suit out of court he would let McClure settle it." The Court, Hon. W. W. PEPPER presiding, charged the jury that, "the first enquiry would be: Was there a renting? and if so, was the rent money due the plaintiff for more than three years before the bringing of this suit? That if plaintiff delayed for three years after the rent was due, to bring his suit, he could not recover unless the defendant had made such a promise to pay as would take the case out of the statute of limitations. If the jury should find from the proof that the parties agreed to refer the matters or claims to a third person to settle for them, and mutually agreed to pay the one to the other, as the result might determine, whatever might be found to be due by such third person; or, if they found that defendant had promised to pay the plaintiff whatever might be found due him, that would prevent the operation of the statute of limitations, provided that it was within three years before the bringing of this suit; and that no precise sum need to have been mentioned, but a general promise to pay whatever was, or might be found to be due, would be sufficient to prevent the application of the statute of limitations."

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He further charged, "that it would make no difference whether the defendant rented the premises of, and was the tenant of King, provided they should find from the proof that he had promised to pay the plaintiff the rent in either of the modes pointed out in the charge." There was verdict and judgment for the plaintiff below, from which defendant appealed in error to this court.

ROBT. BAILEY and DUDLEY, for the plaintiff in error.

SHACKLEFORD and HUMPHREY, for the defendant in error.

CARUTHERS, J., delivered the opinion of the court.

This is an action of debt for rent. The defense is rested upon two grounds:

1. That the renting was from King, who agreed that the rents should be paid in repairs, which had been made; and if not, he was liable to King, and not to Johnson.

2. That the claim was barred by the statute of limitations.

Upon the first point, the Court charged, "that it would make no difference whether the defendant rented the premises of, and was the tenant of the plaintiff, or whether he had rented the place of King, and was the tenant of King, provided they should find from the proof that the defendant had promised the plaintiff to pay him the rent, in either of the modes pointed out in this charge." This is not correct, without qualifications. In the case stated it would have to appear that

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Johnson was entitled to the rent upon the contract of King to make a promise to pay him binding; otherwise, a promise to pay him would be void for want of consideration.

Second. As to the proof necessary to take a case out of the statute of limitations, his Honor charged: "If they should find from the proof, that the parties agreed to refer their matters or claims to a third person to settle for them, and mutually agreed to pay one to the other, as the result might determine, whatever might be found to be due by such third person; or, if they found that the defendant promised to pay the plaintiff whatever might be found to be due him, that would prevent the operation of the statute, provided it was within three years before suing; and that no precise sum need have been mentioned, but a general promise to pay whatever was or might be found to be due, would be sufficient to prevent the application of the statute of limitations."

We think this charge cannot be sustained as the law of this State. Something more is required to revive a debt barred by the statute of limitations. There must be an express, unconditional promise to pay, or such an acknowledgment of an existing debt as will imply a willingness or promise to pay it if no express promise is made. When the remedy is barred by the lapse of three years it must be created anew to sustain an action. 2 Humph., 166. This can only be effected by a distinct and unequivocal acknowledgment of the debt; (4 Yerger, 174;) by an *express promise to pay*, or an admission of an *existing debt* still due, which he is *willing* to pay. *Thompson vs. French*, 10 Yerg., 456. The

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rule is thus laid down in the Supreme Court of the United States, in *Bell vs. Morrison*, 1 Peters, 362: "If there be no express promise, but a promise to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay." This is approved in *Belote vs. Wynne*, 7 Yerg., 534.

In the case *Hale vs. Hale*, 4 Humph., 183, the law on this point was carried to its limit. But there the defendant had "admitted that he *owed* the plaintiff, and if he would do within one hundred dollars of what was right he *would pay* him." True, it is not necessary that a specific sum should be admitted to be due, or an *express* promise to pay; but there must be a promise to pay something, or an acknowledgment that there is something due in reference to a particular subject matter. The Court say in *Hale vs. Hale*, "it is enough if an indebtedness be admitted in reference to a particular subject matter, and a willingness be expressed to pay such amount as may be due." This position is further guarded by the remark that "we do not mean to say that a general admission of indebtedness will authorize the plaintiff to prove any accounts he may produce, however varied in their origin, and remote from the meaning of the party making the admission. The admission must refer to a particular subject matter of indebtedness, so that if the sum be not specified in the admission it may be made certain by the proof." We yield to the authority of this case, but it certainly goes as far as can be justified upon principle, to say the least. But it does not sustain the charge in the case

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before us. That assumes the law to be, that an agreement to refer the matters in dispute to a third person to settle, and to pay the one to the other, whatever he might determine to be due, without the acknowledgment that any thing was due, would take the case out of the statute, or revive a debt already barred. By reference to the evidence of McClure it will be seen that the defendant insisted that he did not owe anything, but agreed to pay if the referee decided otherwise. The referee did not act upon the case. The more general proposition in the charge, "that if they found the defendant promised to pay the plaintiff whatever might be found to be due him," is likewise erroneous; because, first, there is no reference to any particular transaction, or subject matter; and, second, because there is no admission that any thing was due.

To say, "if I owe you any thing I will pay you," or, "I do not owe you any thing, but I will refer the matter to A B, and if he says I do I will pay," does not revive a debt, if one in fact did exist, because the promise or acknowledgment is conditional, not only as to the amount, but as to any indebtedness at all. But to say "I admit I am indebted to you," (in reference to a certain matter,) "but not to the extent you claim, and will leave it to A B, and will pay the amount when thus ascertained," would be sufficient, according to the case of *Hale vs. Hale*.

In all such cases, the question is, whether there is a promise to pay the debt which is barred, or the acknowledgment of an existing debt, in such terms and under such circumstances as to authorize an inference

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McKizzack & Co. vs. Harmon W. Smith.

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that he is willing to pay it, or to imply a promise to pay it.

The judgment will be reversed, and the cause will be remanded for a new trial.

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McKIZZACK & Co. vs. HARMON W. SMITH.

LIMITATIONS. *Administrators and executors. Act of 1789, ch. 23, § 4.* A request made by an administrator or executor of a creditor for indulgence and delay until said representative can collect the debts of the estate, or until he can collect money, is a *special request*, and for a sufficiently *definite time*, within the meaning of the *proviso* to the act of 1789, ch. 23, § 4, to obviate the statute of limitations created by said act.

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FROM MAURY.

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This was a proceeding originating before a justice of the peace in Maury county, upon a *scire facias* against the defendant in error, as administrator of Harmon Miller, deceased, to revive a judgment rendered against said Miller in his life time, and which was brought by appeal into the circuit court of said county. The defendant plead the bar of the statute of limitations of two years, to which there was replication of delay at the special instance and request of defendant. It appeared in proof that the defendant had, within the two years, when the debt was demanded, promised

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that it should be paid as soon as money enough could be collected; and another time, as soon as Joseph H. Miller could collect some money. His Honor, Judge MARTIN, charged the jury, that a request for delay until the representative can collect money, or until he can collect debts of the estate, is not a "special request," or for a sufficiently definite time. There was verdict and judgment for the defendant, and the plaintiff appealed in error to this court.

W. S. FLIPPIN, for the plaintiff, cited 2 Humph., 565. 11 Humph., 517. 9 Yerger, 433.

PAYNE and GANTT, for defendant, cited act of 1789, ch. 23, § 4. 9 Yerger, 433.

McKINNEY, J., delivered the opinion of the court.

This was a *scire facias* to revive a judgment rendered by a justice of the peace of Maury county, on the 26th of September, 1839, for the sum of \$68, in favor of McKissack & Co., against Harman Miller.

The defendant, Miller, died in 1848, and on the 6th of November of that year, the defendant in error was appointed administrator of his estate. The *scire facias* issued on the 14th of March, 1853. The defendant pleaded the limitation of two years, declared by the act of 1789. To this there was a replication that the plaintiffs delayed to sue out execution upon said judgment at the special request of the administrator, &c. The jury found for the defendant, and judgment was rendered accordingly.

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McKizzack & Co. vs. Harmon W. Smith.

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The error assigned is in the charge of the court. The part of the charge excepted to, is the instruction that "a request to delay until the representative can collect the debts of the estate, or until he can collect money, is not a special request, or a sufficiently definite time."

It is asserted for the defendant in error, that this instruction is fully supported by the case of *Trate vs. Wert*, 9 Yerg. R., 433. It is not our purpose to question the correctness of the doctrine of that case, in its application as between creditors of the estate and the personal representatives; but we do not deem it proper to press it any further. If the question were an open one it might perhaps admit of some doubt whether, in the exposition of the *proviso* to the fourth section of the act of 1789, it is not going very far, to hold that, by a "special request" for delay, is meant a stipulation for special delay *for a definite time* of indulgence. It is certainly true, as said in that case, that this provision of the statute was designed not for the benefit of the personal representative, but for those interested in the estate. But it is no less true, that in some instances, where the number of creditors is large, and the estate in an unsettled condition, it may be greatly for the benefit of those interested therein, that such delay should be obtained as may enable the personal representative, in the exercise of proper diligence, to collect in the assets and provide the means of discharging the debts, so as to save the enormous sacrifice which sometimes happens, resulting from forced sales of property and the payment of costs of suit. In considering the case of *Trate vs. Wert*, it is neces-



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sary to refer to the state of facts upon which the decision rests. In that case, to a plea of the statute of two years, the plaintiffs replied in substance, a demand and payment of part of their debt by the administrator, within two years from the time of his qualification, and that at the time of making said payment he "specially requested plaintiff to delay bringing suit against him for the balance, *for a short time*, whereupon, &c. But the proof was, according to the report of the case, that the administrator, at the time he paid part of the debt, merely promised to *pay the balance soon*. There really appears to have been no request for delay, whatever; and even if there had been, the promise to *pay soon* was properly considered as too vague and indefinite.

This subject came under review again in a subsequent case, (*Pucket vs. James*, 2 Humph., 565,) and it was held in that case, that a request for indulgence "till the land should be paid for, was sufficiently definite. That a stipulation for delay for a *specific length of time*, was not necessary; and that delay for such a period of time would enable the administrator to effect a certain specified end, or "until he could accomplish a certain event, named and stipulated in the request," was sufficiently definite.

The principle of that case has been approved and reaffirmed in later cases, not reported. And it seems to us, that the request in that case is not more definite than the request in the case under consideration.

To the argument that, upon this doctrine it is placed in the power of the personal representative of the estate, by his negligence to postpone the creditors, and

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likewise the distributees for an unreasonable length of time. The answer is, that the remedy against improper delay is in their own hands. The law affords them, respectively, ample means of coercing the executor or administrator to a prompt discharge of his duties.

The judgment of the circuit court is erroneous, and will be reversed.

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RED RIVER TURNPIKE CO. *vs.* THE STATE.

**CRIMINAL LAW. Corporation. Indictment.** An incorporated turnpike company may be indicted under its corporate name for suffering their road to be out of repair, to be acted upon through the medium of the officers who represent it; or the proprietors of a turnpike, or the keepers thereof, may be indicted by their proper names for the same offence, stating their relation to the road as owner or keeper.

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FROM SUMNER.

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The Red River Turnpike Company was indicted in the circuit court of Sumner under their corporate name, for permitting their road to be out of repair. There was a demurrer to the indictment under an agreement between the counsel for the company and the State, that in the event said demurrer should be overruled the company should be allowed to plead over to said

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indictment. Judge BAXTER presiding, overruled the demurrer, and on the jury trial there was a verdict for the State, upon which the court rendered judgment, imposing a fine upon the company, from which an appeal in error was taken to this court.

GUILD, for the plaintiff in error.

SWAN, Attorney General, for the State.

TOTTEN, J., delivered the opinion of the court.

The plaintiff in error, a corporation and owner of a turnpike road, was indicted in the circuit court of Sumner for permitting its said road to be and remain out of repair. To the indictment there was a demurrer, which was overruled by the court, and the corporation fined in the sum of fifty dollars.

The corporation is indicted by the name and description of the "Red River Turnpike Company," and the question made is, whether it may be indicted by its corporate name?

By the act of 1831, ch. 42, any "person or body corporate," owner of a turnpike road, "who shall fail or refuse to put and keep the same in repair as prescribed in the act of incorporation," shall be subject to presentment or indictment in the same manner as overseers of roads. Under this act the corporation may be proceeded against, and fined by its corporate name. There is no doubt that the same may be done at the common law. The corporation owes a duty to the public to keep its road in proper condition and repair

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as the consideration by which it is entitled to receive tolls for the use of the road; and if it fail in the performance of this public duty, it may be held to make atonement to the public in this mode of proceeding. It will be acted upon, of course, through the medium of the officers who represent it.

But, it is said that the act of 1849, ch. 175, requires that the indictment, or presentment, shall be against the "president of any chartered turnpike company." That is true in reference to the offences declared in that act; which provides in substance, that the *owner* of the turnpike road shall not be permitted to obstruct it by placing on it rock or gravel, or other material intended to be used for repairs, or by other means whatever. In such case the indictment may be against the "president of the company."

But we do not consider that this act repeals or impairs in any degree, the provisions of the act of 1831, before referred to; for, they may well stand together, and be in force. By the one, the road shall be kept in repair; by the other, in making those repairs the *owner* of the road shall not obstruct it by placing his materials upon it; nor shall he otherwise obstruct it to the public prejudice, though he be *owner*. And while commenting on this statute, we do not intend to say that it creates a new offence, requiring a provision for a new remedy. For, if the owner of a turnpike road, chartered and kept for public use, obstruct it when it is his duty to keep it open and clear of obstruction, is he not liable in the same manner as if the road were not in repair. The injury to the public is the same.

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We may further observe that the act of 1835, ch. 66, provides that the "proprietors of turnpike roads," or "the keepers thereof," who shall permit their roads to remain out of repair, are liable to be proceeded against in the same manner as overseers of public roads.

It will be seen, therefore, that an incorporated turnpike company may be indicted by its *corporate name*, or the *proprietors* of such turnpike, or *keepers* thereof, may be indicted by their *proper names*, stating their relation to the road, as owner, or keeper.

Judgment affirmed.

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STERLING DAVIS vs. DAVID BAUGH, ex'r.

1. WILL. *Capacity of infants to make will of personalty.* An infant may make a testament of chattels, if a male, at the age of fourteen; and if a female, at the age of twelve years.
2. SAME. *Same. Origin of the rule.* The rule as to the capacity of infants to dispose of personal property by will is derived originally from the civil law, and was adopted by the English ecclesiastical courts having jurisdiction of the subject of wills and intestates' estates. Their rules of decision upon these subjects have been received and admitted by immemorial usage as a part of the common law of England, which system has been adopted by us so far as it is consistent with the nature and genius of our institutions.

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FROM WILLIAMSON.

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This was an issue of *devisavit vel non* upon the will of William T. North, deceased, submitted to a jury of

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Williamson county, before Judge BAXTER, at the July Term, 1853, of the circuit court of said county. The testator was eighteen years of age at the time of the execution of the will, and died soon after. The testator had survived his father and mother, and died without brother or sister. By the will he bequeaths his whole estate, consisting altogether of personal property, to David Humphreys, his most intimate friend, and to the mother of said David, who were his relatives, and to both of whom he was greatly attached. The defendant in error was named in the will as executor, and the contestant, Sterling Davis, is the grandfather of the testator. The only question presented by the record, is, as to the capacity of the testator, as an infant, to make the will. The jury below established the will, from which the contestant appealed in error.

R. C. FOSTER and Cook, for the plaintiff in error.

J. MARSHALL, D. CAMPBELL and McEWIN, for the defendant in error.

TOTTEN, J., delivered the opinion of the court.

This case is an issue *devisavit vel non* on a writing that purports to be the will of William P. North, deceased. He made and published the writing as his will when only eighteen years of age, and shortly after died. It was held to be a valid will as to the personal estate, and Davis, the contestant, appealed in error.

The error assigned, is, that an infant under twenty-one years of age is not legally competent to make a

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will. It is to be observed that we have no statute provision on this subject. We must, therefore, recur to the common law for a rule of decision. There is some conflict of opinion among the writers upon ancient common law, on this subject; but the better opinion is, and so it has long been held, that an infant may make a testament of chattels, if a male, at the age of fourteen; and if a female, at the age of twelve years.

Thus Mr. Kent: "Testaments of chattels might, at common law, be made by infants at the age of fourteen, if males; and twelve, if females." 4 Kent Com., 506. 1 Will. on Ex., 15. 2 Bl. Com., 479. 1 Jarman on Wills, 28.

It is true that this rule, derived originally from the civil law, is the rule of the English ecclesiastical courts having jurisdiction of the subject of wills and intestates' estates. And their rules of decision upon those subjects have been received and admitted by immemorial usage as a part of the unwritten, or customary law of England; recognized and sanctioned in the common law courts at Westminster. 1 Bl. Com., 80. 1 Will. on Ex., 15.

So that those rules of decision have become incorporated into, and form a part of the common law of England, which as a system of law has been admitted and adopted here, so far as was consistent with the nature and genius of our institutions.

Hence, in testamentary cases, our courts constantly recur to the reported judgments of the ecclesiastical courts in similar cases, for rules of decision. Thus, it has been held that two witnesses are necessary to prove and establish a will, a rule derived from the ecclesiastical

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cal law on this subject. *More vs. Steele*, 10 Humph. Rep., 562.

In this view, and for these reasons, we regard the rule in question as a part of the common law in force and use in this State.

Judgment affirmed.

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JOANNA HOUSTON vs. M. D. EMBRY.

1. HUSBAND AND WIFE. *Deed to the wife in exclusion of the marital right.* A deed of gift to a *feme covert* "to the only proper use and behoof" of the said *feme covert*, "her heirs and assigns forever," is wholly insufficient to create a trust for the separate use of said *feme covert*. The words are inappropriate to such a purpose, and from their use no such intention in the donor can be inferred.
2. SAME. *Technical words. Intention.* Although technical words are not necessary to create a trust for the separate use of a *feme covert*, yet it is indispensable that the intention to create such a trust shall be clearly manifested, otherwise the marital rights of the husband will not be effected.

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FROM FRANKLIN.

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This was a bill filed in chancery at Winchester, by Joanna Houston, to recover of the defendant a slave she claimed by deed of gift from her father, William Smith. The deed was executed in 1819, and the slaves therein given were delivered to her, she being then a *feme co-*



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*vert*, the wife of Jonathan Houston. The slaves given were Milly and Eliza; and the slave in controversy was Charles, the issue of Milly. It seems that the husband of complainant, at the time of the gift was intemperate and improvident. The words used in the deed of gift are, to the "said Joanna Houston, her heirs and assigns, to the only proper use and behoof of her, the said Joanna, her heirs and assigns forever." It appears also, that about the same time the donor gave to two of his sons certain slaves by deeds of gift containing the same words. The husband died in 1849, having sold and conveyed the boy, Charles, to one Simmons, by bill of sale, duly registered, who, in 1843 sold and conveyed said boy, Charles, to the defendant, who held him by virtue of said purchase until the filing of this bill, after the death of Jonathan Houston. The Chancellor, RUTLEY, decreed in favor of complainant, and the defendant appealed.

COLYAR, for the plaintiff in error, said :

It is now well settled that technical words are not necessary to create a separate estate. Clancy, 262. 8 Yerger, 33. 6 Humph., 487. It is also settled that the intention of the donor is to be gathered from the instrument itself and from the particular words. Bell, 476. The words here are: "To the only proper use and behoof of her, the said Joanna Houston, her heirs or assigns forever," which I think are as strong as words can be not to be technical words. To her *only* use, or "only proper use," as clearly excludes every body else, as any language could to a mind not versed in

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legal technicalities. "To her sole use," is sufficient. 1 Young, 562. 2 Story's Eq., 1382.

The definition of the word "sole," according to Walker, is, "single, only;" and according to the same author, the definition of "only" is "single," "one and no more," "this and no other." According to Webster, the definition of "sole" is "single, only;" and according to the same author, the definition of the word "only" is "single, one and no more;" as "John was the only man present." And then, in addition, we have the word, "proper," which means, peculiar, naturally or essentially belonging to a person or thing, not common; as in this case, not common, but peculiarly belonging to the donee. Such is the import of this word, that in *Hartley vs. Haile*, 5 Ves., 544, the master of the rolls decided that the words, "to pay into her proper hands," created a separate estate, and which opinion is quoted approvingly by Clancy, 267.

Now, if we regard the donor as understanding the import and meaning of the words he used, we cannot doubt his intention. He uses words that mean precisely the same thing that the technical words do. And to a mind not versed in legal technicalities they would convey the idea of a separate estate as fully as the technical words themselves. If the estate conveyed, is to be for her *only* use, clearly no body else has any interest in it, and clearly the marital right is excluded. Upon authority there can be no doubt about the case. The following words have been held sufficient to create a separate estate: "To pay into her proper hands," 5 Vesey, 540. "To and for the sole use and benefit," 19 Vesey, 416. And other authorities cited approvingly by

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Clancy, 267. "For her own use and at her own disposal," 1 Term, 222; Clancy, 268. "For the livelihood," 3 Atkins, 399; Clancy, 269. "To her separate use or disposal," Cooper Eq. R., 283; 19 Vesey, 416; 2 Story Eq., 1382. "To her sole use and benefit," 1 Younge Rep., 562; 2 Story Eq., 1382. "Her receipt to be a discharge," 3 Bro. Chancery Reports, 381; 5 Vesey, 517.

The question, whether the words, "to her own use and benefit," are sufficient to create a separate estate, has been considerably discussed. And in reading the elementary works one might suppose there was a conflict, but when we come to analyze all the cases it will be found that they can be reconciled. There are two cases where these words were held not to be sufficient; and which are sometimes cited as producing at least a conflict. The case of *Willis vs. Layers*, 4 Mod., 409; and the case of *Roberts vs. Spicer*, 5 Mod., 491. But these cases were both decided upon peculiar grounds. In the first case there was a bequest to a married woman, "for her sole and separate use;" and afterwards, in the same will, the residue was bequeathed to her "for her own use and benefit." Sir John Leach, the Vice Chancellor, held that the latter words did not create a separate estate, because a previous part of the will showed that the testator actually knew what the technical words were, and therefore his Lordship could not infer that as to this legacy he intended what he had not expressed. And in the second case, the testator bequeathed a legacy to a married woman, and then by negative words excluded the husband from all control over it. And afterwards, in the same instrument,

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bequeathed to the same woman \$200, "to and for her own use and benefit;" and it was decided that the latter words did not create a separate estate. These cases were both decided upon the same ground, viz: that the instruments themselves furnished evidence that the testator knew how to exclude the marital right by technical language, and nothing could be inferred against the husband when he had not done it.

These cases, instead of being authority against the view I take of it, are, in my judgment, in favor of it. They proceed upon the grounds, tacitly, that unless the instrument had shown upon its face that the maker knew the technical language, the words would have been sufficient. But, aside from this reasoning, admitting these to be authorities against me, they do not affect the case. In 7 Vin. Ab., 96, the words, "to be at her disposal, and to do therewith as she shall think fit," were held sufficient; and in *Prichard vs. Amis*, where a legacy was given to a married woman, "for her own use and at her own disposal," it was decided that the words were sufficient.

In the case of *Lamb vs. Milnes*, 5 Vesey, 517; and 1 Sup. to Vesey Jr., 410, the case of *Jones vs. —*, is referred to, where it was decided by the master of the rolls, that a gift to the wife, "for her own use," was sufficient to create a separate estate; and this decision seems to be approved by Clancy, 267. At page 268, of his work, Clancy, referring to a case in 1 Mod., where the words "to and for her use," were held not sufficient, says the same construction has been put on the words "for her own use and benefit," when the testator had used, with respect to other property, the

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technical language fit to confer a separate estate," and then cites the cases of *Willis* vs. *Layers*, and *Roberts* vs. *Spicer*, above referred to. As much as to say that "for her own use and benefit" would do except in that sort of a case.

But one decision has been made upon these words in the United States, that I can find after the most diligent search. That is the case of *Jamison's Ex'r* vs. *Brady*, decided by the Supreme Court of Pennsylvania, in 1821, and which has not been regularly reported, being still in manuscript; though the substance of the decision, and the reasoning of Chief Justice Tilghman, may be found in a note to *Lamb* vs. *Milnes*, 5 Ves., 1 Am. ed., at p. 520. This reasoning, I think, is more satisfactory than any I have seen. The bequest in that case, was, "I give to Martha Brady \$2,000, for her own use." The giving "it for her own use," said Chief Justice Tilghman, "is an uncommon expression, and denotes some particular intention. If it had been intended barely to give the legacy, subject to the marital rights of the husband, it would have been sufficient to say, 'I give it to Martha Brady.' But the addition of the words, *for her own use*, is tantamount to saying, "not for the use of her husband; because, if it was for *his use* it could not be for *her own use*."

Our own supreme court, if they have not decided upon these words, have approved the decisions made upon them. In the case of *Hamilton* vs. *Bishop*, in 8 Yerger, at page 40, Judge Green says: "A variety of expressions have been collected by Mr. Clancy, (pp. 263-268,) which will be considered a sufficient expression

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of the intention. As if the words used are, "to be at her disposal," "for *her own use*," or "that she shall enjoy and receive the rents and profits." Any of these expressions being deemed equivalent to the words, "sole and separate use;" here, then, the judge says emphatically, that the words, "for her own use," are equivalent to the words, "for sole and separate use. And now, if the words, "for her own use," "or own use and benefit," will do, it will not be contended, I imagine, that the words, "to the only proper use and behoof of her, the said Joanna," are not sufficient.

The view I take in this case is much strengthened by the case above referred to in 8 Yerger, and the case of *Beaufort's Ex'r vs Collier*, 6 Humph., 487. The first case was a gift by deed to a married woman, and the heirs of her body, of a negro woman and other personal property; to the use and benefit of the said Elizabeth and children, and to remain in the possession of said Elizabeth for the use and support of said children forever. This was held to create a separate estate; the court recognizing the principle that technical language is not necessary, and that the question in all such cases turns upon the intention of the donor, to be gathered from the instrument itself. Compare the words of that case with the words in this deed, and it will be found that this is much nearer technical, and more fully conveys the idea of a separate estate.

The case of *Beaufort, adm'r, vs. Collier*, was a bequest in a will. The words were, "for her and her heirs' benefit." And although the reason that it was given to her was fully shown in the instrument, yet,

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when the Court came to reason about the words themselves, they say the gift for "her and her heir's benefit, or in other words, 'for the benefit of Isabella and her children,' of itself, plainly shows the intention to exclude the marital rights of any husband she might take."

Here the Court evidently put stress upon the word, heirs. It being doubtful whether the donor, or testator intended to exclude the marital rights of the husband, the fact that he used the word heirs, or gave it for the benefit of the heirs, (which, according to the understanding of most men, means children,) was looked to; knowing that most men think if property is given to a woman and her children, her husband can not dispose of it. Not that the word heirs would be sufficient, but that it might be looked to in a doubtful case to ascertain the intention.

W. E. VENABLE, for the defendant in error.

William Smith, by deed, dated 19th March, 1819, gave to his daughter, Joanna Houston, two slaves, Eliza and Milly, "unto the said Joanna Houston, her heirs or assigns, to the only proper use and behoof of her, the said Joanna Houston, her heirs and assigns forever."

At the date of this deed Joanna Houston was the wife of Jonathan Houston, and so continued until about Feb., 1849, when he died. He disposed of a slave, Charles, seven or eight years old, increase of Milly, to one Simmons; from whom the defendant acquired Charles by bill of sale, dated 22d day of February, 1843, duly registered.

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William Smith, by deed, dated 8th March, 1819, gave to William S. Smith two slaves, Harry and Nancy, with the same *habendum* and *tenendum*, as in the deed to Joanna Houston.

William Smith, by deed, dated 8th March, 1819, gave to his son, John L. Smith, two slaves, John and Philadelphia, with the same *hab. et ten.* as in the deed to Joanna Houston.

Complainant insists that the words of the *tenendum* and *habendum* in the deed from William Smith to Joanna Houston, vest her with a separate estate in the slaves, Eliza and Milly, mother of Charles.

Defendant denies this, and insists that he purchased Charles of A. Simmons, who purchased Charles of Jonathan Houston, husband of complainant; both paying a valuable consideration, and bills of sale accordingly are filed.

1. Because the words of this *habendum* have been immemorially used to convey estates in fee; and have never been considered as used to convey a separate estate to a *feme covert*.

2. Because the maker used the same words to convey an absolute estate to his two sons.

3. Because the words themselves, have never, in any instance, been used to convey a separate estate. Story Eq., § 1382, and Hill on Trustees, 420, 421.

4. Because the intention to exclude the marital rights must be clearly expressed. See Hill on Trustees, 420. Swan's R., —.

5. Because there is no trustee named in the deed.



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McKINNEY, J., delivered the opinion of the court.

The complainant's bill alleges, that on the 8th day of March, 1819, her father, William Smith, conveyed to her, by a deed of gift, two female slaves, named Eliza and Milly; that at, and preceding the date of conveyance, she was a *feme covert*, wife of one Jonathan Houston; that her husband was intemperate and improvident, and therefore the intention of her father was to secure said two slaves, and their increase, to her exclusive and separate use. That her *coverture* continued until the early part of 1849, when said Jonathan Houston died; and that in his lifetime he squandered and disposed of said slaves, and their increase. It appears that a boy named Charles, the issue of Milly, came to the possession of the defendant in the year 1843, by purchase from one Simmons, to whom Jonathan Houston had conveyed said slave a few days before, by bill of sale. To recover this slave from the defendant, is the object of the present bill. The deed gives the slaves Eliza and Milly, to the complainant, "to have and to hold the above named Milly and Eliza unto the said Joanna Houston, her heirs or assigns; to the only proper use and behoof of her, the said Joanna Houston, her heirs or assigns forever." And the question is, are these words sufficient to give the complainant a separate estate in said slaves?

The cases upon this subject involve some very nice distinctions; and in some instances, to say the least, would be extremely difficult to reconcile. It is well established, however, that although technical words are not necessary, yet it is indispensable that the intention to create a separate use or estate shall be clearly manifested; other-

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wise, the marital rights of the husband will not be affected.

After an examination of all the authorities to which we have had access, we are of opinion that the words: "to the only proper use and behoof of her, the said Joanna Houston, her heirs or assigns forever," are wholly insufficient to create a trust for the separate use of the complainant.

This is a set form of words taken from the complicated and redundant precedents of conveyancing formerly in use, which has long been regarded, even in England, as wholly useless; and in this country, under our simple forms of conveyance, as a mere unmeaning, useless form. The words are inappropriate to the purpose of creating a trust for the separate use of a married woman; and from their use, therefore, no inference of such an intention can be deduced. Words in themselves much more apt and significant, have been held insufficient to give a separate estate. A gift or bequest to a married woman "for her own use and benefit," or "to pay the same into her own proper hands, to and for her own use and benefit;" or, to pay annually "into her proper hands, for her own proper use and benefit," have been held not to amount to a sufficient expression of an intention to exclude the marital rights of the husband. See 2 Story's Eq. Jur., § 1383, and cases referred to.

The tendency of modern decisions seems to be, that more unequivocal evidence of the intention to create a separate use for a married woman ought to be required, than was formerly considered sufficient. Hill on Trustees, 420. 2 R. & M., 180. But the case before us does not require that we should make any intimation of

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our own views, as respects the tone of the modern cases upon this subject.

The chancellor having decreed for the complainant, the decree will be reversed, and the bill be dismissed, but without costs.

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M. H. GLEAVES vs. THE BRICK CHURCH TURNPIKE CO.

1. CORPORATION. *Acceptance of charter. Liability of stockholders.* A subscription of stock in a corporation, made before the charter is accepted by the company, is not binding on the subscribers, and may be withdrawn at any time before such acceptance.
2. SAME. *Evidence. What is an acceptance of a charter.* The acceptance of a charter may be inferred from acts done in pursuance of its provisions. It is not indispensable to show a vote of acceptance, or written agreement to accept.
3. SAME. *Subscription of stock before acceptance. When it is binding.* It seems that a subscription of stock by one of the corporators after the act of incorporation, though before the regular organization of the company, but made with a view to, and in anticipation of a subsequent organization, would be binding on him after a regular organization under the charter, although there may have been no express concurrence on his part in the acceptance of the charter and organization of the company.

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FROM DAVIDSON.

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This cause originated before a justice of the peace in Davidson county, in a suit instituted by the defendant in error against the plaintiff in error, for a five *per cent.* call on the stock of the plaintiff in error in their turnpike road. The charter of this road was granted by the

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act of 1849-50, ch. 78, § 9-11, by which Gleaves, the plaintiff in error, is constituted one of the corporators, with seven others who are the defendants in error. Any five of said company are authorized by the charter to locate said road, receive subscriptions, &c. In April, 1851, a meeting of the commissioners was called at the "Brick Church," and five or six of them were there during the day, but there were never five of them present at one time. Gleaves left before the others arrived, but he remarked to one of them whom he met in the road, that he would assent to any thing that might be done. The three or four commissioners who remained, decided to open books for subscription; and they procured a book for that purpose, wrote a proper caption, and proceeded to procure subscription. Gleaves, the plaintiff in error, subscribed therein to the amount of \$1,000. In June, 1851, Gleaves signed a notice calling for a meeting of the commissioners at the court house in Nashville, on the 7th of June, "to take measures to organize the company, and for other purposes." He appeared at the meeting, but declined to have anything further to do with the enterprize, and asked that his name be erased from the list of subscribers. The company was then regularly organized under the charter, and proceeded to collect in the stock. Gleaves refused to pay, and this action was brought to enforce it. There was judgment before the justice for the company, and also verdict and judgment for the company in the circuit court to which the case had been brought by appeal; whereupon, Gleaves appealed in error to this court. The portion of Judge Baxter's charge excepted to, is quoted in the opinion.

MEIGS, for the plaintiff in error.

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ANDREW EWING, for the defendant in error. He cited Angell & Ames on Corporations, 536-7.

McKINNEY, J., delivered the opinion of the court.

On the 28th of January, 1850, by an act of the general assembly, a turnpike road company was incorporated, known by the name of the "Brick Church Turnpike Company;" the members of this company being the plaintiff in error, and seven others named in the act of incorporation. The charter confers on any five of the corporators power to locate the road, and to open books for subscription of stock. The company did not organize until the 9th of June, 1851. But before the acceptance of the charter and organization of the company, by the procurement of some of the corporators, a book was prepared for the subscription of stock, and the following agreement written therein: "We, the undersigned, do hereby subscribe for the number of shares attached to each of our names, in the Brick Church turnpike company, and bind ourselves to pay over to said company the amount of our respective subscriptions, in compliance with the act incorporating said company, passed by the general assembly of Tennessee, January 28th, 1850. Witness our hands, this 12th April, 1851." Underneath this agreement in the book, the plaintiff in error signed his name as a subscriber for forty shares of stock, amounting to one thousand dollars. Other persons in like manner subscribed for stock in said road. On the 5th of June, 1851, the plaintiff in error, and six others named in the charter, caused a notice to be

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written and made public, (which notice was signed by them respectively,) to the effect that a meeting of the company would be held at the court house in Nashville, on the 7th of May, 1851, "to take measures to organize the company, and for other purposes." About the time of the publication of this notice, the plaintiff in error made sale of a valuable tract of land, through which, by the route designated in the charter, the turnpike road was to be laid out. On the appointed day of the meeting of the corporators, the plaintiff in error, after being sent for several times, appeared and declared that he intended to have nothing more to do with the road, and requested that his name be erased from the subscription book.

After this, a call was made for five per cent. on the stock subscribed, and the plaintiff in error refusing to pay said call, this suit was brought to recover the same, and a recovery was had in the circuit court. His honor, the circuit judge, instructed the jury in substance that a subscription of stock, made before the charter was accepted by the company, would not be binding on the subscribers, and might be withdrawn at any time before such acceptance. But that if Gleaves subscribed for stock in contemplation of the charter being accepted, and — without rescinding or withdrawing his subscription — the charter was afterwards accepted, and he concurred in the acceptance, such concurrence was an act from which the jury might infer a ratification of the previous subscription, in the absence of any thing to rebut such inference. That if Gleaves and the other commissioners who signed the notice referred to in the proof, issued such notice with the intention thereby of

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accepting the charter, that such act would amount to an acceptance, and that after the charter was accepted, Gleaves could not withdraw his subscription without the consent of the company.

In these instructions, we perceive no just ground of exception on the part of the plaintiff in error. The charge concedes, that to make the subscription binding upon Gleaves, there must have been not only an acceptance of the charter, but that *he* must have concurred in such acceptance. By the terms of the charter, any *five* of the persons named therein—being a *majority* of those intended to be incorporated—are made competent to organize the company, and consequently possessed the power to accept the charter. And it would seem that a subscription for stock, made by Gleaves after the act of incorporation, though before the regular organization of the company, but made with a view to, and in anticipation of a subsequent organization, would be binding on him as a regular organization under the charter, although there may have been no express concurrence on his part in the acceptance of the charter and organization of the company. It would be sufficient in such case, to say the least, that he had not, prior to the organization, expressly *dissented* and repudiated the subscription. An acceptance of the charter by a majority of the company, conferred upon Gleaves all the privileges of a member of the corporation. The subscription thereby became invested with the character and force of a contract, and the interest acquired by Gleaves in the stock of the corporation, and the profit to be derived therefrom, formed a sufficient consideration to enable the company to

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M. H. Gleaves vs. The Brick Church Turnpike Co.

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recover the amount subscribed, and to preclude him from setting up the want of mutuality, or of consideration. So that upon this point, if there be error in the charge, it is against the defendant in error. See Angel & Ames on Corporations, ed. of 1852, § 523.

It is clear that there is no error in the proposition that the notice calling a meeting of corporators, for the express purpose of a regular organization of the company under the charter, was an acceptance of the charter. The act of making such call must of necessity have been preceded by a determination to accept the charter; no other conclusion is admissible. The acceptance of the charter may be inferred from acts done in pursuance of its provisions. It is not indispensable to show a vote of acceptance, or written agreement to accept. *Ib.*, § 83.

It has been held that a charter beneficial to a corporation may be presumed to have been accepted, and an express acceptance is not necessary. 7 Pickering's Rep., 844.

There is no error in the record, and the judgment is affirmed.



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Benjamin Franklin vs. Geo. W. Ezell.

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## BENJAMIN FRANKLIN vs. GEORGE W. EZELL.

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1. PLEADING. *Failure of consideration.* In an action by the payee of a bill single against the maker, given for the purchase money of a slave bought by the latter of the former with warranty of soundness, it is a good defense in bar of the plaintiff's action to plead that a fraud was practiced by the plaintiff upon the defendant in the sale of said slave, and that the same, at the time of said sale, was utterly worthless and of no value; and if the defendant make good his plea by proof, the plaintiff cannot recover. *Act of 1850, ch. 60, § 1.*
2. AGENT. *Implied power of.* An agent authorized to do a certain act, is impliedly invested with authority to do all that is necessary and usual to effect the object of his agency, and all the means justified by usage in such cases may be employed by him, unless such implied authority be expressly negatived by the principal. Thus, an authority to the agent to sell and dispose of a slave, confers upon him full power to make a warranty.
3. SAME. *Fraud of, how far principal bound by.* The fraud of an authorized agent will avoid a contract entered into by him in behalf of his principal. Although such misrepresentation may be unauthorized by the principal, yet if he ratify the contract, he will be bound thereby, for he cannot make the contract his own by availing himself of its benefits, and at the same time avoid responsibility for the fraud upon which it is founded.

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FROM GILES.

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The plaintiff by his agent sold to the defendant a female slave for \$700, and this action of debt was brought to recover the amount of a note given in part payment. The agent was authorized to "sell and dispose of" the slave, and gave the defendant a warranty of soundness in the name of the plaintiff, without seal. It appears that the slave at the time of the sale was wholly valueless on account of disease, and the defendant offered her back to the plaintiff. This fact of unsoundness and fraud was specially plead by the defendant, upon which there was issue. It seems also that the fact of unsoundness must have been known to both the plaintiff and his

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agent. The case was submitted to a jury of Giles county, at the August Term, 1853, of the circuit court, before Hon. W. P. MARTIN, Judge, when there was verdict and judgment for the defendant, from which the plaintiff appealed in error to this court.

BROWN and WALKER, for the plaintiff in error.

T. M. JONES, for the defendant.

McKINNEY, J., delivered the opinion of the court.

This was an action of debt in the circuit court of Giles, brought upon a bill single for \$393.00, executed by Ezell to Franklin on the 6th of May, 1851.

This note formed in part the consideration agreed to be paid for a female slave, purchased by Ezell from the agent of Franklin. The purchaser was in the State of Mississippi on the day the note bears date. Franklin was a resident of Tennessee, and on the 21st of April, 1851, he gave a written authority to Fitzpatrick "to sell and dispose of" said slave, in pursuance of which the agent made the sale to Ezell at the price of \$700, and executed a bill of sale in the name of his principal, without seal, warranting said slave "to be sound and healthy."

The proof shows that on the next day after the sale, the slave was examined by the physicians, and was found to be laboring under *umbilical hernia* in a most aggravated form, and to such extent as in the opinion of the physicians to be incurable, and to render the slave almost, if not altogether valueless.

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Benjamin Franklin vs. Geo. W. Ezell.

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The evidence tends to establish that the agent, on his way to Mississippi with the slave, became fully aware of her diseased condition, if not informed of it before; and from all the circumstances of the case, it is fairly to be presumed that the injury to the slave, which perhaps had been of recent origin, was perfectly well known to Franklin, and was the sole cause for sending her off to be sold. A special plea, setting up the fraud and failure of consideration, was pleaded in bar of the action, upon which issue was joined. The jury found the issue in favor of the defendant, and a new trial being refused, an appeal in error was prosecuted to this court. Several objections have been urged against the judgment in the argument here, none of which in our opinion are tenable.

1. There can be no doubt but that in the present state of our law, the matter of the plea in bar constitutes an admissible defense to an action at law upon a *bill single*. Prior to the act of 1850, ch. 60, § 1, the consideration of a bond or other sealed instrument could not, in general, be enquired into in an action at law founded thereon, and the party was driven to seek relief in a court of equity. But that statute provides that in all suits thereafter brought in the circuit court, or before a justice of the peace, "upon any bill single, bond, or other instrument under seal," the defendant "may plead and give in evidence, all matters of defense in such suit, which, by the existing laws and rules of evidence," he "might plead or give in evidence in a suit upon any similar instrument not under seal."

Now, in an action upon a simple contract, it is well settled, that when there is a *total* failure of considera-

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tion, the contract as between the immediate parties may be avoided, and treated as if there never had been any consideration whatever. So when goods are sold under a warranty that they are of a particular kind or quality, or adapted to a particular use, and they turn out to be utterly valueless, and not to answer the description, the contract is at an end, and they need not be even returned. 9 Barn. & Cres., 259. Story on Con., 3d ed., § 480. Meigs' Rep., 155.

In an action on a promissory note given for the price of goods sold with a warranty, it is a good defense that the goods turned out to be of no value. It is otherwise, of course, when the seller has made no warranty, and practiced no fraud. Chitty on Con., 463, note 1. But unless the property be utterly valueless, it would seem that it must appear that it was returned, or an offer made to return. 3 Wend. Rep., 236.

2. It is clear that the authority to sell and dispose of the slave, conferred upon the agent full power to make a warranty. When an agent is authorized to do a certain act, he is impliedly invested with authority to do all that is necessary and usual to effect the object of the agency, and all the means justified by usage in such cases may be employed by him, unless such implied authority be expressly negatived by the principal. Chitty on Con., 219.

3. It is equally clear that the fraud of an authorized agent will avoid a contract entered into by him in behalf of his principal. Although the misrepresentation may have been unauthorized, yet if the principal ratify the contract, he will be bound thereby, for he cannot make the contract his own by availing himself of its

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benefit, and at the same time avoid being responsible for the fraud which forms the basis of it. He must adopt or reject the contract *in toto*. Story on Con., § 496. Other minor objections need not be noticed.

There is no error in the record, and the judgment is affirmed.

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UNION BANK OF TENNESSEE vs. A. J. SMISER.

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1. PAYMENT. *Acceptance by creditor of a bill or note of a third person in payment.* Proof of the acceptance by the creditor, of a promissory note or bill of a third person, if it appear to be the voluntary act and choice of the creditor, and not a measure forced upon him by necessity when nothing else could be obtained, will support the defense of payment.
2. SAME. *Same. Certificate of deposit.* Where a creditor having the option of taking cash elects to take a bill, which is dishonored, the original debtor is thereby discharged. So where an agent having a note to collect voluntarily receives from the debtor, without his guaranty or assignment, a certificate of deposit in payment thereof, which was good and available at the time, and said certificate is afterwards protested for non-payment, the amount of said certificate cannot be recovered from said debtor.
3. SAME. *Same. Evidence.* When a creditor takes notes from his debtor in payment of the debt, and omits to require his endorsement thereon, such omission is *prima facie* evidence of an agreement to take the notes at his own risk. And whether a security was accepted in satisfaction of the original claim, is a question of fact for the jury.

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FROM MAURY.

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The plaintiff in error instituted this action of assumpsit against the defendants in the circuit court of

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Maury county, to recover the amount of a certificate of deposit which had been transferred to the plaintiff by the defendants, under the following circumstances: In June, 1847, the defendants in error gave their note to one Carrington for \$2,000. The note was deposited by Carrington in the branch of the Union Bank at Columbia *for collection*. On the 25th of August, 1847, the defendants, or one of them, called at the bank, said note being then *over due*, to pay the same, and asked the cashier, Hamner, "if he would take a certificate of deposite on the Merchants' Insurance office at Nashville, for \$1,000 as cash, in part payment of said note, to which the cashier replied that "he would," and did take said certificate for \$1,000; and the balance was paid in cash, and said note was given up to the defendants. There was nothing said about taking the certificate *absolutely in payment* of said note, and without recourse on the defendants. The cashier, in his testimony, states that "he did not agree so to take it, and had he been asked so to take it, absolutely and without recourse, he would have refused;" but that "he took it in *payment* of so much of Carrington's note, and the balance was paid in money; that as the certificate was payable in cash on presentation, and the Insurance was at that time, believed to be in good credit, he agreed to take it as cash." That as cashier, "he had no authority to take, nor was he in the habit of taking checks, drafts, or any thing of the kind, absolutely and without recourse." "But he was allowed as cashier, and it was his habit to take checks, drafts, or any thing purporting to be payable on presentation in cash, and as this certificate was payable in cash he

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agreed to take it as cash." He advanced the money of the bank to Carrington, by giving credit on the books of the bank for the full amount due upon the note *as paid in cash*, and afterwards remitted the amount to Carrington in a check on the north. But neither of the defendants at that time, or at any other time, ever requested the cashier or the plaintiffs to advance this money in payment of said note to Carrington. The certificate was endorsed to J. Smiser by Jane Greenfield, executrix of the original payee, and by him endorsed to the plaintiff with the express understanding that it was done as a mere matter of form, to pass the title, and he was in no way held responsible for the same. It was immediately sent to Nashville for payment, and on presentation at the insurance office payment was refused on the ground that the office had no sufficient evidence that Jane Greenfield was the legal representative of the original payee, of which the defendants were informed; and before the letters testamentary could be forwarded the insurance company failed; and the certificate, accompanied by the letters testamentary, being afterward forwarded, was presented for payment, dishonored and protested, but no notice given to the endorsers. Thereupon the suit was brought, which resulted in the court below, (Hon. W. P. MARTIN presiding,) in a verdict and judgment for the defendants; from which the plaintiff appealed in error to this court.

S. D. FRIERSON, for the plaintiff in error.

For the plaintiffs in error, it is insisted that the verdict by the jury is contrary to the evidence, and

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the law as applicable to the facts shown by the proof. When payment is made by a draft on a banker, if the person receiving it uses due diligence to get it paid, the person from whom he received it will not be discharged unless the holder expressly agreed to run all risks. Chitty on Bills, 9 Am. ed., marginal, p. 434.

A check upon a bank, given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. 1 Hall's Rep., 56.

The holder of the check, in such cases, becomes the agent of the drawer to collect the money, and if guilty of no negligence, whereby an actual injury is sustained by the drawer, he will not be answerable, if from any peculiar circumstances attending the bank the check is not paid. *Id.*

In a suit against the drawer for the consideration of such a check, the holder may treat the check as a nullity, and resort to the original consideration. *Id.*

For the plaintiffs in error it is further insisted that there is manifest error in the charge of the court in several particulars.

Much of this charge is in no way applicable to the merits of this case. The judge has, in all his charge, or most of it, treated the case as if this suit was brought on the \$2,000 note. The bank was the agent of Carrington to collect the note; she was, to all purposes, the holder of the note; as between herself and Carrington she could receive payment only in cash. As the holder, she could take in payment from the maker any thing she pleased. The question is not, then,



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whether the Carrington note was paid in the arrangement between the cashier and the defendants. It is admitted that the note was paid as between Carrington and the defendants, or as between the plaintiffs, as holder, and the defendants; but it was paid (to the extent of the amount of the certificate of deposite) with the money of the plaintiff, and that at the express request of the defendants. The plaintiffs advanced \$1,000 of their money, through the officer of their branch, to enable the defendants to pay their note, and took the certificate of deposite to forward and collect, and then reimburse themselves for this advance. This is the nature and essence of the transaction. The true question then is, if the plaintiffs exercised due diligence in presenting the certificate of deposite for payment, and payment was refused, and notice of this fact given in due and reasonable time to the defendants, or either of them, are the defendants liable for the amount advanced for them? The defendants are clearly liable, unless they show that Hamner agreed at the time to take the certificate and run all risks. The proof is by Hamner that he did not so agree; that he was not asked to take it in this way, and that if he had been he would have refused; because, in the first place, he was not allowed by his principals, the plaintiffs, to take this kind of paper, or any other, unless upon the responsibility of the person or persons from whom he received it; and for the further reason that he is not in the habit of taking such paper without recourse. A receipt of a note as cash, is not evidence that it is received as an absolute payment. 5 Johns. R., 68. 8 Johns. R., 389.

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If a note "is received by the party to whom it is delivered, as conditional payment of a precedent debt due to him, or as a conditional satisfaction for any other valuable consideration, then paid by him, the holder, who delivered it, will, if the note be duly presented and dishonored, and due notice thereof be given to him, be responsible to pay back the full amount of the precedent debt, or valuable consideration, although he is not directly liable, or a party to the note." Story on Prom. Notes, § 117.

"A transfer by mere delivery, without endorsement, when made on account of a pre-existing debt, or for a valuable consideration, passing to the assignor at the time of the assignment, (and not merely by way of sale or exchange of paper, as when goods are sold to him,) imposes an obligation on the person making it to the immediate person in whose favor it is made, equivalent to that of a transfer by formal endorsement." Chitty on Bills, 9 American from 8 London ed., p. 268.

He is not liable as an endorser upon the note, but he is liable if the instrument should be dishonored, to pay the debt, in respect of which he transferred it; provided the instrument has been presented for payment in due time, and due notice be given to him of the dishonor. *Id.* Baily on Bills, ch. 5, § 3, p. 169.

The holder is not bound to give notice of the dishonor to any more than his immediate endorser; and each party to a bill has the same time after notice to himself, for giving notice to other parties beyond, that was allowed to holder after the default. 4 Hill N. Y., 129, 133. 5 Metcalf, 213.

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And when a bill or note is sent to an agent for collection, the agent is required simply to give notice of the dishonor in due time to his principal, and the principal then, has the same time for giving notice to the endorsers, after such notice from his agent, as if he had been himself an endorser, receiving notice from a holder. 2 Hill N. Y. R., 452. 9 Pick, 547.

The plaintiff in error insists further, that there is error in that part of the charge of the judge below, which is as follows: "If the bank, by its officers, accepted the certificate in part payment of the Carrington note, and no fraud being practised by the defendants at the time, it will be a good payment and extinguishment of the note to that amount; and if the plaintiffs afterwards, and before the collection of the certificate, advanced the amount thereof to Carrington, they cannot charge the defendants therewith." The Court, in a former part of the charge, charged that "it was competent for the bank to receive in payment of the note; a note or claim upon another, and when paid and received, it will, to that extent, be an extinguishment of the debt. Why then may not the bank advance the amount to Carrington before the payment of the certificate.

The fact of taking the certificate as a part payment of the note, is an extinguishment of the liability of the defendants to Carrington, and is money advanced by the bank to Carrington at the instance of defendants.

Again, the judge in his charge, makes a distinction in the responsibility of the defendants, arising from the duty of the bank between the fact whether the certificate was taken by the bank for collection, or in pay-

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ment. In the one case, that is, if taken for collection, it was the duty of the defendants to furnish the evidence of Mrs. Greenfield's authority to order the payment of the money to her assignee. In the other case, that is, if taken in payment the bank was bound to procure this evidence, and that the defendants were not bound to furnish it, unless it was exclusively under their control.

There can be no foundation for this distinction. It is confounding the liability of the defendants to the bank for the amount of the certificate, with the liability of defendants on the note to Carrington.

In another part of the charge, the Court charged the jury "that if the defendants were not endorsers on the certificate, it was the duty of the bank to give notice of non-payment to Mrs. Greenfield in such time and in such manner as would hold her liable; and if the bank failed to do this, the defendants would be discharged, and could not be held liable for the amount of the certificate."

In this it is insisted there is error. From the authorities referred to, the defendants, although not endorsers, were liable under the facts of the case, as if they were endorsers. They were immediately liable to the bank, and the bank had a right to notify them of the non-payment of the certificate. The bank was not bound to give notice to Mrs. Greenfield unless she wished to look to her.

In connection with this, the court charged the jury that merely telling the defendants the certificate was not paid, and the reason why it was not paid, was not sufficient notice of non-payment to hold the defendants

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liable; that the bank must go further in her notice, and inform the defendants that she would look to them for payment. This is error, because the bank was agent of defendants to collect the certificate. She faithfully discharged this duty.

The whole charge is calculated to confound the jury, in not distinctly stating the plaintiff's right to recover, and the law as applicable to this right.

M. S. FRIERSON, for the defendant in error.

1. That it was competent for the bank to accept in payment from her debtors a note or claim upon any third person; and when a claim is taken upon a third person, and it is agreed and understood between the parties that it is taken in payment, the original debt will be extinguished to the extent of the payment. 2 Green. Ev., § 523. Story's Notes, §§ 104, 105, 404, 438.

2. But if the claim upon a third person is taken without any such agreement and understanding, it would not be considered in law a payment, but would be a mere mode to obtain payment; and if not paid, the original debt would not be extinguished. Story's Notes, §§ 104, 105, 117, 404, 438.

3. If Hamner, as the agent of Carrington and cashier of the bank, took this certificate as a cash payment of \$1,000 on the Carrington note, and afterwards advanced the money of the bank to Carrington on the faith of the certificate, without the request of the defendants, the bank, on failing to collect the certificate, could not sue the defendants and recover the amount advanced. Chitty on Con., 592. 7 Humph. R., 270. 4 New Hamp. R., 138.

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4. Again, if this certificate was taken *for collection*, and not in payment of the Carrington note, and the cashier of the bank advanced the money of the bank to pay the Carrington note, without the *request* of the defendants, the plaintiffs could not recover, unless the defendants subsequently promised to pay the sum; for no one can be made a debtor without his consent. 7 Humph., 270. 5 Cowan, 603. 3 Johns., 434. 15 John., 361. 11 Wend., 629 *et seq.*

5. If the jury should believe that the bank advanced to defendants the amount of the certificate, and took the certificate to collect for them, it was the duty of the defendant to furnish the evidence of Mrs. Greenfield's representative character; and if they did not do so until the insurance office failed, it would be their loss, and the bank could recover the amount advanced.

6. But if they believed that the certificate was taken in payment of the Carrington note, and as so much cash, it became either the property of Carrington or the bank, and defendants would be under no obligation to furnish the letters testamentary, but the parties must attend to their own debt; and if lost, they could not look to defendants. Story's Notes, §§ 117, 284.

7. If the bank advanced the defendants the amount of this certificate, and took it from defendants to collect without their endorsement, it would be the duty of the plaintiffs in that case to have the certificate presented in proper time for payment, and if payment was refused, to notify all those who would be liable to defendants on the paper; and if they failed to do so, and defendants have sustained loss, they will be discharged to the extent of the loss. Story on Prom., §§ 117, 284, 389. Story on Bills, 372.

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8. But if the defendants had endorsed the certificate to the bank, it would be sufficient to hold them responsible if the certificate was presented in proper time, and notice given to them of the non-payment, and that they were looked to for the payment.

9. But merely informing the defendants that the insurance office would not pay the certificate until they had some evidence of Mrs. Greenfield's representative capacity, is not such notice as the law requires to fix the liability of the endorser. Story on Notes, §§ 350, 353. 7 Bing., 530. 11 M. & W., 373. 11 Wheaton, 431, 437. But if this charge is erroneous this court will not reverse, because there is no testimony in the record to which it is applicable, the defendants not being endorsers on the certificate. 2 Humph., 518. 3 Humph., 56.

10. If the evidence of Mrs. Greenfield's representative character was afterwards furnished, and payment refused, it was the duty of the bank to give notice; and if she did not, the endorsers would be released; and if defendants sustained an injury, they would be released to the extent of the injury. 11 M. & W., 372. Story's Notes, 117, 284.

CABRUTHERS, J., delivered the opinion of the court.

This action of assumpsit was brought to recover \$1,000, the amount of a certificate of deposit given by the Merchants' Insurance Office to G. T. Greenfield, by whose administrator or executor it was assigned to the defendants, and by them it was delivered to the plaintiffs, in part payment of a note of \$2,000 in favor of

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one Carrington against the defendants, held by the Bank for collection. The other \$1,000 was paid in cash, the note given up, and the whole amount of \$2,000 entered to the credit of Carrington, and paid to him in a check on the North. The certificate was sent to Nashville, to be collected from the office which was then paying all demands against it; but refused to pay this, upon the ground that the authority of the assignor or representative of the payee, did not accompany the certificate. It was returned, and one of defendants requested to procure the desired evidence, and the matter having been some days delayed, the office failed, and the money lost. Upon the last demand at the office, with the proper evidence of Mrs. Greenfield's representative character, the certificate was protested for non-payment, but no notice given to any of the parties. The bank received the certificate in payment of the note as cash; and there was no assignment by the defendants. The bank then instituted this action, and the question is, whether the defendants are liable under the circumstances?

They are not liable on the paper, because they did not in any way bind themselves upon it, so as to become guarantors or assignors. It is not pretended that they were guilty of any fraud or misrepresentation. The claim was unquestionably good at the time it was passed to the bank, and would have been paid on demand, if it had been accompanied with the proper evidence of transfer from the original payee. This it was the duty of the bank to have procured, as the certificate had been taken as cash, in payment of a debt in its hands as agent for collection, and was no longer in the power or under the control of defendants. There was no act



to be done by the defendants, the neglect of which would make them responsible.

There can be no ground on which they should be subjected to a loss, which resulted from the delay or neglect of the plaintiff to make the claim available. This certainly would have been different if the claim had been received as collateral security, or to collect and apply as agents of defendants; or, perhaps, if nothing had been said or agreed upon that subject. But it was taken as cash, and in payment of that amount of the note of Carrington, and the amount was so entered to the credit of Carrington, and paid over to him, and the note given up to defendants as paid off and discharged. It was voluntarily taken as cash by the officers of the bank, by which the defendants were prevented from attending to the collection of it themselves, which doubtless they would have done without delay, in order to pay off the note against them. There can be no principle, under these circumstances, that would throw the loss upon them.

The plaintiff insists that this is a case of money paid out for the use and benefit of defendants, and upon that count a recovery should have been had. But there was no request, either express or implied, to make the payment. Chitty on Con., 591-2.

The certificate was offered and taken in discharge of the note upon them as cash, and there remained no debt due to Carrington from defendants upon which money could have been paid for them. It became the debt of the bank, as it had received the amount in such funds or paper as was acceptable, and voluntarily taken in full discharge.

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Proof of the acceptance of a promissory note or bill of a third person, if it appear to be the voluntary act and choice of the creditor, and not a measure forced upon him by necessity, when nothing else could be obtained, will support the defense of payment. 2 Greenleaf Ev., § 523.

The omission of the creditor to have the notes endorsed by the party from whom he received them, is *prima facie* evidence of an agreement to take them at his own risk. *Ib.*, note 4. 11 Johns., 409. 15 Johns., 241. Whether this security was accepted in satisfaction of the original claim, is a matter of fact for the jury. 9 Johns., 310. 15 Sar. & Raw., 162. If the creditor having the option of taking cash, elects to take a bill which is dishonored, the original debtor is discharged. Byles on Bills, 305.

In this case the makers of the note were good and solvent, and having this certificate of deposit, paid it over to the bank, because upon the suggestion of the defendants that they held it, and would pay it to them as cash if it would suit them, it was readily received, as perhaps it suited the bank better than money, as the funds would be at Nashville where it would probably answer their purposes better than at Columbia.

But let this be as it may, under a proper charge of the law, so far as it is applicable to the facts of this case, it has been found by a jury that the certificate was received as so much cash, in payment of the note held by the plaintiff against the defendants, and not as a means of payment, or an agent to collect and apply to that purpose, and we cannot disturb the verdict.

Let the judgment be affirmed.

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Walker & Langford vs. Ellis & Moore.

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## WALKER &amp; LANGFORD vs. ELLIS &amp; MOORE.

1. **DAMAGES.** *In actions ex contractu.* In actions of contract to recover damages for breach, generally speaking the damages are limited to the natural and proximate consequences of the breach complained of; and damages remotely or consequentially resulting therefrom, or merely speculative damages, cannot be claimed.
2. **SAME.** *For breach of specific contract.* In an action for a breach of a specific contract, the party injured is bound to use proper means and efforts to protect himself from unnecessary loss or damage, and can charge the other party only for such damages as by reasonable endeavors and expense he could not prevent. Thus, in a suit upon a breach of a contract by which the defendant had engaged to put up machinery for a mill, and to place the same in successful operation, if the adaptation of said machinery to the purposes in view could as well have been tested in a day or a week as in a month or a year, the delinquent party cannot be subjected to the increased expenses resulting from the continued unavailing experiments persisted in by the other party to test the operation of said machinery.
3. **NEW TRIAL.** *Evidence.* If in an action for damages for breach of a specific contract, evidence objected to by the defendant is permitted to go to the jury as to damages of a nature too remote, uncertain and speculative to form a just and proper measure of the recompense to which the plaintiff is entitled, and the jury render a verdict against the defendant, a new trial will be granted.

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FROM MAURY.

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This action was brought by the plaintiffs against the defendants, to recover damages for the breach of a contract without seal, whereby the defendants had undertaken to put up machinery for a mill and place the same in successful operation for the plaintiffs. The contract is dated 26th of July, 1851, and the defendants were to have the work done by the 1st of October of the same year. The main breaches assigned are, that the defendants failed to complete the work by the time contracted

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for, and it was done in a negligent, unskilful, and unworkmanlike manner; besides which, the plaintiff declares upon various breaches in special counts, and upon the common *indebitatus* counts. The mill was not ready for operation until the following April, and it appears the machinery was not put up according to contract. The case was submitted to a jury of Maury county, at the September Term, 1853, of the circuit court, before Judge BAXTER, when there was a general verdict for the plaintiffs, assessing their damages at \$1,600. The judgment was afterwards arrested, and the case brought up by both parties to this court. The matters assigned for error on behalf of defendants, fully appear in the subjoined brief of their counsel.

PAYNE and GANT, for the plaintiffs in error.

[No briefs on behalf of the plaintiffs have been furnished the Reporter.]

M. S. FRIERSON, for defendants in error:

The plaintiffs obtained a verdict against the defendants. Defendants moved for a new trial, which motion was overruled. They then moved in arrest of judgment; which motion was sustained by the court, and the judgment arrested on the ground of misjoinder of causes of action. The first count, after setting out the contract in substance, avers that "by reason of the negligence, carelessness, and unskillful conduct of the defendants, said work was delayed contrary to the effect of said agree-

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ment and the promises and undertakings of said defendants." The first amended count avers "that the said work in the contract specified was put up in a negligent, unskillful, and unworkmanlike manner, and by reason of the said negligent, improper, unskillful and careless performance and putting up said work by said defendants, the said plaintiffs were compelled to take down, remove and destroy," &c. The other counts are common counts in *assumpsit*.

I. The breaches of the special counts quoted above, show them to be *in tort*; they allege the injury to plaintiffs as resulting from negligence, carelessness, and unskillful performance of the contract, and not for a breach of the contract itself, and therefore cannot be joined with counts in *assumpsit*. Meigs, 459, 467. 2 Chitty's P., 331-2, 650 to 669.

II. The plaintiffs offered to prove "that they had employed a number of workmen to work on their mills; that they had sustained heavy damage by reason of said hands remaining idle on account of the non-delivery of the machinery; that they were kept idle themselves, and that their wagons had been sent several times for the machinery, and returned without it." They also offered to prove "how long these hands were idle and delayed by failure to deliver the work, and that they were kept idle at a heavy expense." They proposed then to prove "that the timbers about said mills were heavy and required a great number of hands to put them up." To all of which the defendants objected, but were overruled by the court, who decided "that the plaintiffs might prove the idleness of the hands caused by the delay in delivery of the machinery, and that the defendants were

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not only bound to pay an amount of damages sufficient to have made the contract perfect, but they were bound to pay the expense caused by the delay of the hands, and other incidental expenses incurred."

The court manifestly erred in permitting the plaintiffs to prove as items the idleness of hands, delay in business, and expenses incurred in attempting to procure the articles which were to be supplied by the defendants. This court has already decided that these are not items of damage in action for a breach of an agreement to deliver articles. *Porter vs. Woods, Stacker & Co.*, 3 Humph., 56, 61. 21 Wend., 342, 346. 7 New Hamp., 360, 367.

III. The court erred in permitting the plaintiffs to prove "what amount of fire wood these mills would consume in a day; what number of hands it would take to attend the mills; and that the mills would not pay for the hands and fire-wood;" all of which was objected to by defendants, and the objection overruled by the court. The plaintiffs then proposed to prove "what would be a reasonable hire for the hands from Nov. 1, 1851, to April 1, 1852; and what would be the hire from April, 1852, to September, 1852;" all of which was objected to and overruled by the court. Plaintiffs proved the same, including the value of their own services.

1. Because if true, it was the plaintiffs' duty, the moment they ascertained the mills could not run without incurring loss either to themselves or defendants, to desist from using them; and if, after a knowledge of these facts, they went on and incurred loss, it was the result of their own folly, and we are not chargeable

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with the same as damages sustained by the plaintiff. 2 Green. Ev., § 261. 7 Green. Rep., 57. 17 Pick. R., 284.

2. The court by the admission of this proof not only held us responsible for damages incurred by the fault of the plaintiffs themselves, but also allowed them to prove as damages against us, the value of their own services, and a reasonable hire for their hands from the 1st of November, 1851, to the 1st of September, 1852, which in effect would be compensating the plaintiffs for their services and the hire of their hands, and giving to them the use of their own services and the services of their hands in addition, which is so manifestly erroneous that it needs no authority but our every day experience to condemn it.

IV. The court after reading the contract to the jury, told them that "the proper meaning of the agreement was, that the defendants should furnish a competent machinist in putting up the machinery necessary to complete the mills, and not simply such articles of machinery as are specified in the contract; and it amounts to a guaranty that if the plaintiffs put it up under the superintendence, and according to the direction of the machinist thus furnished, they should operate successfully." The contract, after enumerating what work was to be done, and what particular articles of machinery were to be furnished by the defendants, proceeds thus: "Also, we agree to furnish a good machinist to put up the above work and put in successful operation for said Walker & Langford, in Columbia, Tenn." These are the only words in the contract in relation to putting up said machinery.

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We insist therefore that the court erred in the construction placed upon this contract, for the words "above work" evidently referred to the work and articles which were to be furnished by the defendants in the foregoing part of the agreement. The true grammatical reading of this clause of said contract is: "We agree to furnish a good machinist to put up and put in successful operation, the above work, for the said Walker & Langford in Columbia, Tenn." Surely it never was the intention of the parties to furnish a machinist to superintend and complete the entire work of said mills. Story on Con., § 639 to 647.

V. The court further told the jury that "if the machinery furnished was worthless and unsuited to the use for which it was intended, the defendants would be responsible for the value of the machinery. If the defect was radical and could not be remedied but by eviscerating and throwing away the whole work, the plaintiffs would be entitled to the whole cost of putting it up, and the costs of the machinery laid aside, as well as for the materials lost and interest on the money specified in the contract for the delay or loss of time. The court had admitted proof that defendants were bound to pay an amount sufficient to make the contract perfect.

Taking these propositions together, they not only make the defendants pay an amount sufficient to make their contract perfect, but compels them to pay for the materials thrown away and costs of putting up the old machinery, which would be doubling the damages for the same injury.

VI. The court told the jury that the plaintiffs were not bound to accept the machinery after the time speci-



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fied in the contract for delivery; but if the defendants at a subsequent day had it ready to deliver, the plaintiffs might accept it with or without a waiver of their right to damages for the delay; but if they accepted it without more, they might presume a waiver; but this applies to the case up to the time the first machinery was delivered and accepted. But when a part was delivered and accepted, the plaintiffs would have no right to expect that the balance would be delivered when wanted; and if any subsequent delay occurred in delivering the balance, the plaintiffs would not be presumed to waive by any subsequent delivery." In this the court erred, for we insist that if the plaintiffs received the machinery and applied it to their own use, they thereby waived their right to sue for and recover damages for its non-delivery. 4 Shepley R., *Emerson vs. Coggeswell*, 77.

VII. But if we are wrong in all this, the court will see by simply reading the evidence that the great preponderance of proof is against the verdict, and a new trial should be granted for this cause.

McKINNEY, J., delivered the opinion of the court.

This case is brought here by both parties. The action was *assumpsit*, founded upon an unsealed written agreement. The declaration contained special counts, assigning various breaches, and also the common *indebitatus* counts.

The plaintiffs recovered judgment upon a general verdict on all the counts. On a subsequent day of the term, a motion was made in arrest of judgment,

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upon the ground of a supposed misjoinder of counts *in case* with counts in *assumpsit*, and the motion was sustained and judgment arrested. From this action of the court the plaintiffs prosecuted an appeal in error to this court.

After verdict, and before the motion in arrest, a bill of exceptions, setting forth the evidence and various exceptions to the opinion of the Court, was tendered and signed; a motion for a new trial on behalf of the defendants, having been previously overruled, and the defendants have brought a writ of error.

We think there is error in the record to the prejudice of both parties, and that they are severally entitled to a reversal.

First. The Court erred in arresting the judgment.

If it were even admitted that there is a misjoinder of counts, still no exception was taken by demurrer, or otherwise; and under the act of 1852, § 4, no motion in arrest of judgment could be maintained. The judgment in arrest must therefore be reversed.

Second. The judgment against the defendants, upon the verdict, is also erroneous.

1. The Court erred in the construction of the written contract, as to the extent of the obligation it imposed upon the defendants. The jury were instructed that "the defendants, by their contract, undertook to put the mills in successful operation;" and again, "that the proper meaning of the contract was, that the defendants should furnish a competent machinist to superintend the putting up of the machinery necessary to complete the mills, and not simply such articles of machinery as are specified in the contract." This, we

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think, is a misconstruction of the agreement. The defendants only undertook "to furnish a good machinist to put up," and "put in successful operation," the machinery specified in the contract, which they had undertaken to furnish.

2. The rule as to damages, in some respects, we think, was laid down too broadly. The application of rules as to damages, is a subject of much confusion and difficulty, upon which we do not at present mean to enter. In actions of contract, generally speaking, the damages are limited to the natural and proximate consequences of the breach complained of, and damages remotely or consequentially resulting therefrom, or merely speculative damages, cannot be claimed.

The plaintiffs in the present case, are entitled to a just recompense, or indemnity, for the direct and immediate losses which the non-performance of the contract actually occasioned them.

But in the case of a breach of a specific contract, like the present, the party injured is bound to use proper means and efforts to protect himself from unnecessary loss or damages, and can charge the other party only for such damages, as by reasonable endeavors and expense, he could not prevent. 2 Greenleaf's Ev., § 264.

If, for instance, the quality or adaptation of the machinery to the particular purpose in view, could as well have been tested in a day or a week, as in a month or a year, upon no just principle ought the delinquent party to be subjected to the increased expenses resulting from the continued unavailing experiments needlessly persisted in by the other party.

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If the machinery, though not of the quality contracted for, were still of some value, and the plaintiffs retained and used it, the measure of damages would, of course, be the difference between the value, if fit for the purpose intended, and the actual value in point of fact.

Without going into particulars, we think evidence as to damages, of a nature too remote, uncertain and speculative, to form a just and proper measure of the recompense to which the plaintiffs are entitled, was admitted to the jury; and it is impossible for us to know what influence it may have had upon the verdict.

The judgment against the defendants will likewise be reversed, and the case be remanded for a new trial.

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SOPHIA BOSTICK *et al.* vs. JAMES WINTON *et al.*

1. WILL. *Construction. Remainder. Power of appointment in tenant for life.*

Where a testator devised to his son the tract of land upon which said son then lived, during his life, or so long as said son shall continue to reside on the same, at his death or removal to go to the children of such son, or their representatives in fee, with a discretionary power of disposition to said son, at any time before his death or removal therefrom, by deed or will to convey said land to any one or more of his said children, so as to vest the entire estate in said child or children, provided that if said son should fail to exercise said power of disposition, that said children shall take equally at the termination of the particular estate, with a provision that the wife of said son, (should she survive him,) should have a life estate in said land; such a remainder is vested in all the children, subject to the special devise to the wife, and could only be defeated by the bona

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*vide* exercise of the power of appointment. It took effect at the death of the son, or his removal from the land, provided he had not legally exercised said power of appointment. Upon this contingency alone the remainder depended, and if it did not happen, the children, whether born before or after the death of the testator, are the unquestionable owners of the estate.

2. POWER OF APPOINTMENT. *How exercised to be valid.* A power of appointment must be exercised in good faith for the benefit of those who are intended beneficiaries under it. If it appear that it has been exercised collusively, and for the benefit of the party exercising it, such exercise is a fraud upon the power and cannot be maintained. Thus, where a father has a power of appointment to either of his children he might choose, and being required to give bail for his appearance at court to answer a criminal charge, conveyed the estate to one of his sons in order to render said son a good and sufficient surety on his bail bond, who was to reconvey at the end of the prosecution, and the father afterwards sold the land, the son executing a deed to the purchaser, but receiving no part of the consideration therefor, such exercise of the power being for the father's own benefit, was therefore void.
3. CAVEAT EMPTOR. *Purchase at execution sale. Notice of imperfect adverse title.* While a creditor or other person purchasing at a creditor's execution sale, is not affected by notice of imperfect adverse titles; yet, in a contest with those who rely upon a good and perfect legal title, *caveat emptor* is the rule, and such purchaser must look to and stand upon the title he has purchased.

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FROM FRANKLIN.

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This bill was filed by the complainants, Sophia Bostick and her children in the chancery court at Winchester, for the purposes and upon the facts fully given in the opinion. At the February Term, 1853, Hon. B. L. RIDLEY, Chancellor, rendered a decree in favor of complainants, from which the respondents appealed.

COLYAR, for complainants, with whom was W. P. HICKERSON, who said :

1. Littleberry Bostick took a life estate with the power of appointment to any one or more of his chil-

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dren. His children took a vested remainder, subject to be divested by the *bona fide* execution of the power of appointment. See 4 Kent's Commentaries, pp. 20-5, and 323-4. Fearne on Remainders, 228.

2. The power never was executed, or if executed it was done fraudulently, and for the benefit of Littleberry Bostick; and such an execution is absolutely void. See 1 Story, § 255. Sugden on Powers, ch. 7, § 2; ch. 9, § 4. *Butcher vs. Butcher*, 9 Vesey, 382. Madd. Ch. Prac., 246-252. 2 Hovenden on Frauds, 220-2. *Kemp vs. Kemp*, 5 Vesey, 856.

3. Defendant, Winton, is not a purchaser without notice, and if he was he is not protected in this sort of a case. 2 Hovenden on Frauds, 220, 221. 3 Haywood, 147-152. 1 Yerger, 71-73. 2 Yerger, 196. 1 Humph., 491-497. 6 Yerger, 108-115. 1 Greenleaf's Ev., 239-243; see § 262.

THOMPSON and TURNER, for respondents, with whom was E. H. EWING, who said:

1. Is the remainder in this case, vested or contingent? Upon this point I shall rely upon the brief of Mr. Thompson.

2. If vested, was there actual fraud in the execution of the power? If there was not, then Winton's title is good. Upon this point I shall rely mainly upon the argument of Mr. Turney. I would, however, call the attention of the court especially to the position of John G. Bostick, who has every inducement now of real interest in behalf of his family, to have the conveyance to him set aside. His testimony proves against

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him, if now true, both fraud and falsehood at the date of his father's conveyance to him. What he says now, is, that he and his father concocted a fraud, and told falsehoods to Ready and Sneed to conceal it. What reliance can be placed on him. Ready and Sneed and Judge Anderson prove the execution of the power to have been fair. Littleberry Bostick was, according to their proof, to have no interest in the property, present or future. The Court will, however, examine this testimony more particularly than I can do under the circumstances. The competency of Ready and Sneed is not successfully attacked. Their testimony is in favor of the fairness of their clients; is not objected to by their clients, and is in regard to a matter about which there is no proof—that they were employed as counsel by either of the Bosticks. Certainly John G. Bostick was not their client. Their testimony is mainly as to the *res gestae*.

3. Suppose there was actual fraud in the transaction as between the two Bosticks, how does this affect Winton? He is a *bona fide* purchaser without notice: 1. Because he was himself ignorant of the fraud; and if not, 2, he stands in the shoes of Ready and Sneed and Turney, neither of whom knew of the fraud.

4. But it is said that where there is a fraud upon a power of this description, even a *bona fide* purchaser without notice, will not be protected. No authority supports this idea. 2 Hovenden on Frauds, pp. 220, 221, &c., states that, in such a case equity will not aid a *bona fide* purchaser against a remainder-man in possession. In the same connection, however, and at pp. 223, 224, it is said that where such a purchaser had

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got possession the Court would not take the least step imaginable against him. The cases cited in Hovenden, viz: *Turton vs. Benson*, 1 P. W'ms., 496. *Strode vs. Blackburn*, 3 Ves., 225. *Wallwyn vs. Lee*, 9 Ves., 24; and *Seward vs. Saunders*, 2 Ves., 453, sustain this latter doctrine. Winton is in possession.

5. It is said, though, that the defense of *bona fide* purchaser, without notice, is not well set up. Winton says he paid \$2,000 for the land, part to Turney, and for part he gave his notes; that these notes were traded off by L. Bostick and paid by him, (Winton.) The payment to Turney was at the date of the conveyance. The payment of the notes were not to be escaped because they were traded off. There was no adverse possession of the land; there never has been. Littleberry Bostick was in possession of the land, and is stated to have been so, and acted for John G. Bostick. The price given for the land was, though not a full price, yet a fair one; and all these facts appear in the answer, though not very technically, yet substantially. The requisitions of a plea of this kind, or of an answer setting up this defense, are, in substance, complied with. If, however, Winton, standing in his own shoes, cannot be said to be a *bona fide* purchaser without notice, or to have put in his plea in proper form as to himself; yet, as standing in the shoes of Ready and Sneed and of Turney, he does occupy this character, and they are shown to have occupied it. I cite no authority upon this latter point, because it is doctrine familiar to the court.

6. Winton's title is good, because he stands in the shoes of Ready and Sneed, who were creditors and



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purchasers under a judgment and execution against John G. Bostick, who had the legal, and to all appearance, the equitable title to the land. They had no notice of any fraud in the conveyance from Littleberry Bostick to John G. Bostick, and if they had, as creditors, were not bound to notice it. It is not a case where the doctrine of *caveat emptor* applies. They purchase under a title apparently good, and their grantee is in possession. The judgment sale under it, and sheriff's deed to Ready and Sneed, are all stated in the answer, as well as their sale and deed to Turney, and his deed to Winton; all of these deeds are offered by defendant, and without objection are received in evidence in the court below, and are now parts of this record. The judgment, it is true, is not in the record, nor is it necessary, where the purchaser under the judgment, or his assignee, is in possession, and his title is attacked. The sheriff's deed is, in such a case, *prima facie* evidence of the facts recited in it, and conclusive, if unobjected to, unless the contrary be shown. This doctrine has been repeatedly recognized by this court, and especially at the last term in the case of *Edmiston & McEwen vs. Robertson et al.* If Winton were driven to his ejectment this might be different. This last position is conclusive of the case.

HICKERSON, in reply.

It is assumed that John G. Bostick has every motive of family feeling and interest in behalf of complainants, and therefore his testimony is to be received with caution. It is true he is the brother of a portion of

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complainants, and the son of complainant Sophia N., and so far as such position may affect him he is liable to criticism. But, on the other hand, he has every motive of self-interest and preservation, in favor of defendant, Winton, to whom he conveyed the tract of land in controversy by a deed, containing a clause of general and special warranty. In any event, Winton gets John G.'s portion of the land, and if complainants gain the remainder of the tract John G. is liable to him upon his deed aforesaid. So that there is personal interest in favor of defendant, and family feeling and attachment in favor of complainants; but if he stood alone and unsupported, the attack made upon him would be less difficult; but he is sustained by John G. Bostick, of Memphis, who proves the transaction. He is sustained and corroborated by Philip Roberts, who it will be seen, was one of Littleberry's securities, and was present when the thing was done, I mean when the security was given, and Judge Anderson says the execution of the deed and the giving of the security were at the same time. As to the reason why the deed was executed by Littleberry to John G., (and this is the important fact,) he is directly sustained and corroborated by Judge Anderson, and is substantially sustained as to the object in making the deed by Ready and Sneed. Mr. Ready says Littleberry said before or about the time he executed the deed, "that it (the deed) would answer an important purpose, that of enabling John G. to become one of his securities." So that the only difference between them is, that Ready and Sneed, and Judge Anderson did not hear the agreement between John G. and Littleberry; that if Littleberry made his appearance

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the land was to be reconveyed back to Littleberry as it was before; and it is wholly unimportant whether this statement is true or false; for the important inquiry is, was this power executed by Littleberry by a contrivance with his son, so as to enable the father to receive a beneficial interest by the execution of the power. If so, it is actual fraud. See 1 Story, § 255, and authorities cited. All the witnesses on both sides prove this to be so.

2. It is said, if there be actual fraud in the transaction, that Winton is an innocent purchaser himself, and is protected. I still hold that the proof all shows that he had actual notice. So far as the result of this case is concerned, it is wholly unimportant whether it be the law that such notice is necessary or not, for he was actually notified by the facts and by persons who knew how it was. But simply to vindicate the law, I call the attention of the Court upon this point to the following additional authorities not quoted in my brief in this case; which authorities I think show that were he even an innocent purchaser, he cannot, as against complainants, hold the land. See *Alyn vs. Belcher*, 1 Eden, 138. 2 Hovenden, 222. See *Skales vs. Shaly*, 8 Sem., 156, 157, cited in note 4, pp. 386-7. 1 Story Eq.

While it is laid down in all the books that *bona fide* innocent purchasers, for a full and fair consideration, and clearly shown to be such, are favorites with courts of equity; the doctrine can only prevail in cases where the opposite party has been guilty of some *laches*, so as to give such as set up the defense of an innocent purchaser superior equity; or in cases where

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than that, where a party sets up matters in his answer in advance of the allegations in the bill, that the *onus* is upon the defendant to prove these allegations; in other words, nothing is evidence for the defendant in his answer unless it is responsive to the bill. Defendants have not introduced the record of any judgment or execution authorizing a sale of land in controversy. They have received a sheriff's deed, simply. This is not evidence of a judgment or execution. A party relying upon a sheriff's deed for title, must produce and read the record of the judgment authorizing and directing such sale, and without this the sheriff's deed is no muniment of title. See *Kimbrough vs. Benton*, 3 Humph., 129. 3 Humph., 16. *Mitchell vs. Lipe*, 8 Yerg., 179. The record must show also that defendant in the execution was served with process. If these things do not appear the judgment is a nullity, and the court must so determine on the production of the record on the trial of a collateral issue, either at law or in equity. 5 Haywood, 139-55. 1 Meigs' D., 448-9.

But it is said, that if the purchaser at execution sale is in possession, and has a deed reciting the fact of the existence of a judgment, that is sufficient. I can find no such case. It is possible that such might be the case if the party suing for the land was the execution debtor, whose title the purchaser at execution sale had purchased. I can see some reason why this might be so, for the facts would be within his knowledge, and he, in such case, might be compelled to show negatively that there was no such judgment. But this is not that case; it differs from it in two important particulars. 1st, Winton is not the purchaser

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at execution sale; 2nd, complainants are not the execution debtors, nor do they claim under or in privity with him, the execution debtor, but they claim under a superior legal title; they claim under the will of William Bostick, executed in 1835; and they, it is insisted, are to be ousted of their legal title by a sheriff's deed, and this without any judgment against any one. This would be strange law. If such doctrine has ever been recognized by this court, I have not been able to find it.

But again, can a purchaser at execution sale acquire any legal title superior to that held by the execution debtor? Surely not; he, so far as the legal title is concerned, stands in his shoes. So far as the questions of *notice* and of *leins* are concerned, he may in many instances be better off; but these are equitable defenses, and have no application to the case at bar, for complainants' title is purely legal, and to such title these equitable defenses cannot be set up. This defense is not made in the answer, and cannot be decreed upon. In any and every aspect in which the case can be presented, the decree of the chancellor is correct and ought to be affirmed.

It is said complainants did not object to the reading of the sheriff's deed. True, nor could they have done so; it is correctly proven, and defendants had the right to read it for what it was worth, and without the judgment it proves nothing.

CARUTHERS, J., delivered the opinion of the court.

This bill was filed by the children and widow of Littleberry Bostick, claiming the remainder in a tract of

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land under the will of William Bostick, the father of said Littleberry, against the defendant Winton, who claims by purchase and regular deraignment of title, as he insists, under the will.

The facts as they appear in the record are these: William Bostick made his will and died in 1835. In the third clause he devises to his son Littleberry, a tract of land on which the latter then resided, of three hundred acres, in Franklin county, during his life, or so long as he continued to live upon it; "at his death or removal, the same to go to his children or their representatives in fee." He then gives him a limited power of disposition in these words: "But I give to my son, Littleberry, at any time before his death or removal, by deed or will, the power to dispose of said land to one or more of his children, so as to vest the entire estate in such child or children, if he should think proper to do so." In the 7th clause he gives to the wife of said Littleberry, if she should outlive her husband, fifty acres of said tract of land, including the mansion house, with timber to support the same during her lifetime or widowhood. In the 14th clause he provides that if the parent should fail to exercise the power of disposition to one or more of the children, then they all shall take equally at the termination of the particular estate.

In 1841, Littleberry Bostick, in the exercise of the power given him in the will of his father, made a deed in fee for the tract of land to his son, John G. Bostick. At this time Littleberry was under a prosecution for the murder of Lefever, and anxious to procure bail for his appearance. He offered his said son, John G., who, being then insolvent, would not be taken by the court.

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Whereupon, the land was conveyed to him under advice of counsel, and he was then received as bail. He also became security of his father for his lawyers' fees, amounting to \$1,000. In June, 1842, Ready and Sneed recovered judgment on their fee note, and levied upon the said land as the property of John G. and Littleberry Bostick, and became the purchasers at the amount of their debt, including interest and cost, \$574.12. H. L. Turney had taken a mortgage on the same land to secure his fee note for \$500 against the said Littleberry and John G.

On the 27th of January, 1845, Mr. Turney redeemed the land of Ready and Sneed, and received a deed. John G., soon after the deed to him, removed to Georgia, never having taken possession of the land, but the wife and other children of said Littleberry remained upon it, as before, until his time of confinement in the penitentiary expired, and he returned, when he sold the land to defendant, Winton, for \$2,000. About \$1,200 of this was necessary to pay off the incumbrances in favor of Mr. Turney. The balance was paid to Littleberry, or those to whom he assigned the notes. John G. came up from Georgia and made the deed to Winton, and Mr. Turney also executed a quit claim deed.

It is proved by John G. that he told Winton he had no title, and explained fully to him the whole affair. The proof also shows that the land was worth at the time from three to four thousand dollars. He also proves that he was to convey the land back to his father after the prosecution was ended, and that he got no part of the consideration for which it was sold to Winton. The proof is clear that Winton knew all about the state

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of the title, and the cause of the deed to John G., as well as the rights of complainants.

The said Littleberry died in 1848, leaving the complainant Sophia, his widow, and the other complainants, together with defendant, John G., his only children.

It will be seen from this statement of facts, that the main question which arises is, whether the conveyance to John G. was a valid exercise of the power conferred upon Littleberry by the will of William Bostick. And we consider it very clear that it was not. Littleberry Bostick took only a life estate in the land, coupled with a power of appointment to any one or more of his children, subject to the special devise of fifty acres to his wife, Sophia, if she should outlive him. The remainder was vested in all his children, and could only be defeated by the *bona fide* exercise of the power of appointment. 4 Kent, 201, 202, and Fearn on Rem., 277. 16 Virg., 491.

In this case the remainder vested in such children as Littleberry had at the death of the testator; and on the birth of other children, the estate opens and they are let in and become invested of equal proportions of the property. 4 Kent., 205. The vested remainder in the children first becoming capable, is only disturbed by after born children in quantity so as to let in the latter for equal shares. *Ib.* So, by the terms of this will, an estate is given to Littleberry subject only to his continuance upon the land, and at his removal from it, or death, the remainder which was vested is to take effect, provided he has not legally exercised the power of appointment. Upon this contingency alone the remainder depended; and if it did not happen, the



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complainants, whether born before or after the death of the testator, are unquestionable owners of the estate. *Haywood's heirs* vs. *Moore*, 2 Humph., 584-588. Fearn, 228-9.

Then was this power so exercised as to pass the estate to John G., and defeat the contingent remainder to the complainants? The question is answered in Story's Eq., § 255: "A person having a power of appointment for the benefit of others, shall not by any contrivance use it for his own benefit. Thus if a parent has power to appoint to such of his children as he may choose, he shall not, by exercising it in favor of a child in consumption, gain the benefit of it himself, or by a secret agreement with the child in whose favor he makes it, derive a beneficial interest from the execution of it."

This position is well sustained by the cases referred to by the commentator, and we regard it as unquestionable law. In the case before us, the power was avowedly exercised in favor of John G. for the benefit of Littleberry, and was to enable him, by becoming the owner of the land, to become security or bail, and for fees. It was then a fraud upon the power, and cannot be maintained. It did not therefore disturb, or in the least affect the rights of complainants which depended upon the contingency of a valid and *bona fide* exercise of the power.

But secondly, it is insisted that the defendant is an innocent purchaser, without notice. We think that question does not arise in this case, because the proof shows clearly that Winton, at and before his purchase, had full notice or knowledge of all the circumstances attending

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the conveyance to John G. and the continued claim of complainants. Mr. Turney proves that at the time the deeds were executed to Winton, that the Bosticks agreed to get complainants to convey their interest to him. There can be no doubt of the fact that he purchased with full knowledge of the claim of complainants, and of the reasons and object of the conveyance to John G. But as he was getting the land at little more than half its value, he resolved to risk it, and must take the consequences. It is then entirely unnecessary to examine the other grounds presented in the argument for and against the right of an innocent purchaser to plant himself on that defense, and defeat the opposing title. We leave these questions to be settled when they necessarily come up.

The third ground assumed is, that the defendant stands in the shoes of Ready and Sneed, who were judgment creditors, and as such not bound to notice the title of complainants, and must prevail over it. The judgment creditors of Littleberry and John G. Bostick only purchased such title as they had, at the time of sale, and that passed to Mr. Turney at the redemption from them.

The defendant then, by his purchase and deeds from Bostick and Turney, only became invested with such title as they had. And this title as against complainants, must still depend upon the validity of the conveyance to John G. The title of complainants is derived from the will of William Bostick, and is a good and perfect legal title, which could only have been defeated in the single mode prescribed in said will; and this we have seen has not been done, as the

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fraud and bad faith in which the power was exercised renders it null and void, and leaves the rights of these remainder-men in the same condition precisely as if it had not been attempted. It is true that a creditor, or one purchasing at a creditor's execution sale, is not affected by notice of adverse titles which are imperfect for want of registration, &c., but still they must look to, and stand upon the title which they purchase in a contest with those who rely upon a good and perfect legal title. *Caveat emptor* is the undoubted rule in such cases. 2 Yerg., 394. 8 Yerg. 46, 58-9.

The defendant here has all the rights of John G. Bostick, Ready and Sneed, and Turney, but no more. The complainants have a clear legal title under the will, the valid exercise of the power out of the way; and this must prevail against a naked legal title derived under the sheriff's sale.

The unreported case of *Edmiston & McEwen vs. Robertson et als.*, decided at last Term, to which we are referred, rested upon a different principle entirely. In that case, the complainants endeavored to set up a parol defeasance upon an absolute deed, converting it into a mortgage, against those who claimed as purchasers at execution sale of the same land as the property of the vendee.

That case was decided upon the ground that an equitable title resting in parol, could not prevail over a purchaser of the legal title, fair upon its face, and duly registered under a judgment and execution against the legal owner. And further, that a knowledge by such a person of the outstanding equity, would not affect him any more than notice of an outstanding

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unregistered deed. It would of course be different in cases of purchasers at private sale with notice. This was the point decided in that case. It has no analogy to this. There the person who had made a clear and unconditional conveyance of the land, which had passed into the hands of others, attempted to disturb them by the assertion of some reserved equity to be established by parol and change the character and effect of his own deed. Here the title obtained by the defendant, and those under whom he claims, originated in acts with which the complainants had no connection or concurrence. They come forward with a title originating in a different source, and independent in its character. There is no principle which can repel them, and they must prevail.

We have not thought it necessary to notice several other points presented which would be equally fatal to the success of defendant.

There is no error in the decree of the chancellor, and it will be affirmed.

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S. T. Pratt vs. B. Phillips.

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S. T. PRATT vs. B. PHILLIPS.

1. **EJECTMENT.** *By purchaser at execution sale claiming under sheriff's deed. Possession of defendant.* In an action of ejectment brought by the purchaser at execution sale, claiming under the sheriff's deed, against the execution debtor in possession, it is indispensable to authorize a recovery without a regular deraignment of title from the grantor, that it be shown that said execution debtor was in the actual possession of the land at the date of the levy and sale. *Vide Hamilton vs. Jack & McCallister, ante.*
2. **SAME.** *Same. Possession of the tenant of execution debtor.* The rule of law that a purchaser at execution sale in an action of ejectment against the execution debtor, who is shown to have been in possession at the time of the levy and sale, need not go beyond the sheriff's deed, and the record upon which it is founded embraces also the tenant of such execution debtor, who may be the defendant in ejectment; but in such case privity in estate must be shown, or the plaintiff's title must be regularly deduced from the grant.
3. **SHERIFF'S RETURN.** *Parol proof to contradict.* After an official return has become the foundation of a title acquired under a levy and sale, it is not competent to admit parol proof of the officer to contradict his return, either to impeach or sustain the validity of a purchaser's title.
4. **EVIDENCE IN EJECTMENT.** *Parol proof to contradict the date of a deed.* On a trial in ejectment in a court of law, parol proof is inadmissible to show that a deed was in fact executed on a different day from that which it bears date.
5. **EJECTMENT.** *Against execution debtor in possession under equitable title merely.* In an action of ejectment by a purchaser at sheriff's sale against the execution debtor in possession at the time of such levy and sale, if it be shown that the execution debtor at the time of such levy, had only an equitable estate in said land, such sale would communicate no title to the purchaser, notwithstanding the execution debtor may have acquired the legal title in the interval between the levy and sale.

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FROM BEDFORD.

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This was an action of ejectment, brought by the defendant in error against the plaintiff in error, in the circuit court of Bedford, and tried before Judge Davidson, at the December Term, 1853. There was verdict and judgment for Phillips, the plaintiff in ejectment,

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from which Pratt the défendant, appealed in error. Phillips claimed under a sheriff's deed as purchaser at execution sale, under a judgment and execution against one Hiram Edde, and the action was instituted against Pratt the tenant in possession; but no privity of estate was shown between Edde and Pratt. It seems that there was proof of Pratt's possession at the time of the sale, but it does not appear that he had possession at the time of the levy. The material facts are embodied in the opinion of the court.

WISENER and E. A. KEEBLE, for the plaintiff in error.

ED. COOPER and R. B. DAVIDSON, for the defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of ejectment, brought by Phillips against Pratt, in the circuit court of Bedford, on the 30th of November, 1852, under the act of 1852, ch. 152, § 2.

Phillips claims to be the owner in fee of the tract of land described in the declaration, in virtue of a purchase at execution sale. The land was levied upon and sold by the sheriff, on the 31st of July, 1851, as the property of one Hiram Edde, to satisfy a judgment recovered against him in favor of William Boon: and on the 26th of November, 1852, the sheriff executed a deed for said land to Phillips.

From the *face of the officer's return*, it appears that the levy was made on the 15th of Eebruary, 1852. The plaintiff on the trial of the case, offered no evidence of

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title in Edde, the judgment-debtor, to the land levied upon and sold. But the defendant introduced a title bond for said land, executed to said Edde by Joshua Yates, on the 24th of March, 1848, and a deed made by the Executors of Yates (who was dead) in pursuance of said bond, bearing date the 18th of February, 1852, three days after the date of the levy.

The action is against Pratt alone, who plead "not guilty." The proof shows that the defendant was in possession of the land "at the date of the sale," but whether he was in possession at the time of the levy, does not appear. It does not appear that the defendant has any title to the land; nor is it shown that there existed any privity between him and Edde, the judgment debtor.

The defendant proved that the 15th of February, the day on which the levy purports from the return to have been made, was Sunday. To rebut this, the officer was introduced by the plaintiff, who stated that he did not make the levy on Sunday; that it was made "a few days before or after the 15th, on the day before or a day after."

The officer also proved, that before he made the levy, one of the executors told him "that he had made a deed for the land to Hiram Edde." The form of the verdict is, "they find the issue in favor of the plaintiff, and assess his damages, by reason of the premises to five cents." And the judgment upon this finding is, "that the plaintiff recover of the defendant his term yet to come of and in the lands and tenements in the declaration mentioned," &c.

From this statement it is manifest, that the judgment is erroneous in several respects. 1. Upon the facts in

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this record, no recovery could be had by the plaintiff without deraigning a title to the land sued for, by connected conveyances from the grant.

The principle, that a purchaser at Sheriff's sale, in an action of ejectment against the execution debtor, who is shown to have been in possession at the time of the levy and sale, need not go behind the sheriff's deed; and the record upon which it is founded, has no application to this case. It may be conceded, that a tenant of the execution debtor, who was in possession of the land at the time of the levy and sale, would be equally within the foregoing rule.

But in this case, there is no proof of any such relation, or of any privity between the defendant and Edde. And even if such privity was established, the fact that the defendant was in possession at the time of the sale, would be unavailing; it would be indispensable to show that he was in possession at the time of the levy, as held in a case, at the last term at Knoxville. From the fact of such possession, the presumption of title arises.

Under the general issue in ejectment, the plaintiff is put upon the proof as well of a valid legal title to the premises, as of a right of entry, at the time of the demise laid in the declaration. And if this be not done, the defendant, without showing any title in himself, may rely upon his possession as *prima facie* evidence of title, and can only be deprived of his possession by the rightful owner, in whom is the legal estate, and also the right of possession.

And the general rule is, in the absence of a privity in estate between the parties, that the plaintiff's title



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must be regularly and connectedly deduced from the grant; but to this rule there are exceptions, arising out of the doctrine of presumption of title, and also out of the operation of the statute of limitations.

2. It was error to admit parol evidence by the officer, to contradict his return as to the date of the levy. This cannot be tolerated, after the official return has become the foundation of a title acquired under the levy and sale, either for the purpose of impeaching or sustaining the validity of the purchaser's title.

3. It was likewise error, to admit the declaration of one of the executor's, tending to establish that the deed was in fact made at a different time from that which its date imports.

This fact could not be established by parol evidence, on a trial in ejectment in a court of law, and were it even otherwise, the fact is not probable by the declaration of the executor.

4. If the defendant in the execution, were merely vested with an equitable title to the land at the time of the levy, the sale would be wholly inoperative, and would communicate no title to the purchaser, notwithstanding the execution debtor may have acquired the legal title in the interval between the time of the levy and sale. Upon no principle could such after acquired title be held, to enure to the benefit of the purchaser at the sheriff's sale.

5. By the act of 1852, under which this action was brought, it is expressly required that "the verdict shall specify the estate of the plaintiff, whether it be in fee, for life, or for years, and specifying the duration of the term," and "the judgment for the plaintiff shall be, that

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he recover the possession of the premises, according to the verdict," &c.

These requirements of the statute are imperative, and they have been wholly lost sight of in the present case.

If the defect were in the judgment only, we might reverse and render the proper judgment here; but the omission being in the verdict, and that omission essential, it cannot be remedied.

The judgment will be reversed, and the case remanded.

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WESLEY GREENFIELD vs. W. D. DORRIS.

1. *CONTRACT. Constitutional law. Act of 1850, ch. 121, as it affects deeds of trust made before its passage.* The act of 1850, ch. 121, which provides "that in all sales of real estate hereafter to be made under execution or deed of trust, which by existing laws is subject to redemption, if the debtor is permitted by the purchaser or his assignee to remain in possession, he shall not be liable for rent from the date of the sale to the time of redemption, and if the purchaser or assignee shall take possession under his purchase, upon the redemption by the debtor, he shall be entitled to a credit for the fair rent of the premises during the time they were in possession of the purchaser," so far as it relates to sales under deeds of trust, executed anterior to its passage, is unconstitutional and void.
2. *SAME. Power of the Legislature over.* The legislature has power to declare the force and effect of future contracts, made and to be executed in this State. This is an unrestricted power to be exercised at discretion, for the public advantage. As to existing contracts, it is equally well settled that the legislature has power over the remedy, but no power over the contract, as that is secured and protected under the sanctity of the constitution.

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FROM DAVIDSON.

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This was an action for *mesne* profits in the circuit court of Davidson, where there was a verdict and judg-

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ment for the defendant, Judge BAXTER presiding, from which the plaintiff appealed in error. It was submitted upon an agreed state of facts, which are fully embodied in the opinion.

EWING and COOPER, for the plaintiff.

MEIGS and J. A. McMURRY, for the defendant.

TOTTEN, J., delivered the opinion of the court.

This is an action of trespass for mesne profits; there was judgment for defendant, and plaintiff appealed.

The *case* agreed shows that on the 4th of August, 1848, the defendant conveyed a house and lot in Nashville, to James W. McCombs in trust to secure the payment of certain debts. On the 21st of September, 1850, the trustee sold the lot by virtue of the deed, and the plaintiff became the purchaser, to whom the trustee made a deed on the day of sale, the plaintiff paying him the purchase money. The plaintiff demanded possession of the lot, which the defendant refused, and thereupon the plaintiff sued him for it in ejectment, recovered judgment, and in February, 1852, was put in possession.

In April, 1852, this suit for mesne profits was instituted. In August, 1852, the defendant redeemed the property from said sale, according to the Acts of Assembly, 1820, ch. 11, § 2, and 1823, ch. 24, § 2.

And the question is, whether the plaintiff is entitled to mesne profits?

For the defendant it is urged, that the act of February, 1850, ch. 121, applies to the case, and that under

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its provisions, the defendant is not liable for mesne profits. It declares "that in all sales of land or real estate hereafter to be made under execution or deed of trust, which by existing law is subject to redemption, if the debtor is permitted by the purchaser or his assignee to remain in possession, the debtor shall not be liable for rent from the date of the sale to the time of redemption, and if the purchaser or his assignee shall take possession under his purchase, upon the redemption by the debtor, he shall be entitled to a credit for the fair rent of the premises, during the time they were in the possession of the purchaser."

Now the sale was after this act became a law, and there is no question but that it expressly applies to the case.

But the deed of trust by virtue of which the sale was made, was an existing contract when the law was passed, it having been executed before that time.

And it is argued by the plaintiff's counsel that the law operates upon the contract, that it impairs its obligation and effect, and that it is therefore repugnant to the constitution of the United States, which provides that no law impairing the obligation of contracts shall be made. To illustrate and support this position, numerous cases are cited. *Benson vs. Kinnis*, 1 Howard U. S. R. 311. *Gaitly's lessee, vs. Ewing*, 3 Howard's R., 716. *Pool vs. Young*, 7 Monroe's R., 587. *Townsend vs. Townsend*, Peck's R., 1.

As to existing contracts, it is a settled doctrine, that the legislature has power over the remedy, but no power over the contract. That is secured and protected under the sanction of the constitution.

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Now does this law operate upon the contract, or upon the remedy? We shall resolve the question by considering the nature and obligation of the contract, before the law was passed and after it was passed.

A mortgage says Mr. Kent, is the conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it. The legal ownership is vested in the creditor, but in equity the mortgager remains the actual owner, until he is debarred by his own default or by judicial decree. 4 Kent Com., 133.

A deed of trust is merely a mortgage, with or without power in the trustee to sell on default of payment.

If the money be not paid at the maturity of the mortgage, the estate may be sold by the trustee, if the deed so provide, or by judicial decree in chancery, to raise a fund for the payment of the debt.

The beneficial interest, which the creditor has in the mortgage, consists in this fund. The sale has the same effect as sales under *execution*, and it vests the entire and absolute estate in the purchaser, who as owner is entitled to *immediate possession*, and to the enjoyment of the rents and profits of the estate. But there remains in the debtor an equitable right to *redeem* or repurchase the estate, at any time within two years from the time of the sale.

Such were the nature and effect of the mortgage before the law was passed.

But now, it is modified in this, the purchaser is not entitled to the rents and profits, if the estate be redeemed.

This law takes from the purchaser a right and benefit which he had before, and confers upon the debtor a right and benefit, which he had not before under the

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WILLIAM BRAMLET *et al.* vs. THOS. F. BATES *et al.*

1. WILLI. *Construction. Executory devise.* It is a rule of the common law, well established, that a limitation of an estate upon the contingency of the first taker dying without issue or heirs, is bad, as being too remote; because those words have a technical meaning, and *per se* are taken to indicate an indefinite failure of issue. If these words therefore, stand alone in a will they must be construed in their technical sense; but the meaning of the testator, with this exception, being a question of intention, the fixed artificial sense of the words referred to will be controlled by any clause or circumstance in the will which goes to show that he meant by the use of them a definite failure of issue, or a failure of issue at his death, or within a life or lives in being and twenty-one years, and a fraction thereafter. *Vide* acts of 1852, ch. 91.

2. SAME. *Same. Same.* Where a testator dying in 1849, gave his estate to his two sons, J. and T., in equal proportions to them and their heirs forever, creating a limitation in these words: "if the said J. should die *before my son T.*, and without issue, then the property to go to T. and his heirs forever;" such a limitation to T. is a good and valid executory devise, and upon the happening of the contingency contemplated, vests the estate in him.

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FROM OVERTON.

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This bill was filed in chancery at Livingston by the complainants as heirs at law and distributees of Joseph B. Bates against Thomas F. Bates and others, asking a construction of certain clauses in the will of Joseph Bates, deceased; under which the complainants claimed the proportion of property bequeathed by said will to Joseph B. Bates, deceased: and which the said Thomas F. Bates held and claimed after the death of said Jos. B. Bates, under an executory devise to him in said will, contingent upon the death of said Joseph B. without issue during the life of him the said Thomas. The several clauses of the will in controversy are quoted in

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the opinion. Joseph Bates, sr., died in 1849, Joseph B. Bates in 1851, and this bill was filed on the 22d of March, 1853. At the September Term, 1853, of the chancery court at Livingston, Chancellor RIDLEY rendered a decree in favor of the respondent, Thomas F. Bates, from which the complainants appealed.

S. TURNER and JONES, for complainants, with whom was SWOPE, who said:

In construing this will we shall cite some authorities. It has again and again been mooted in our courts and in all the courts of this country and of England. The decisions are not precisely uniform on the question whether similar words to the above, constitute a good executory devise or not, but the courts of this State have followed the current of English decisions, which settle it that the words, "dying without issue," in similar bequests, imply an indefinite failure of issue, and that a limitation over, after such failure, is void, because too remote. In *Chester vs. Greenway*, 5 Humph., 31, this court decides that such a limitation is too remote, and say the question has been so often decided that they think it unnecessary to cite cases. Chancellor Kent has fully examined the authorities, and ably and lengthily discussed this subject in the fourth volume of his Commentaries. At page 276 he says the settled English rule of construction is considered to be equally the settled rule of law in this country, but perhaps not quite so stubborn. In this latter remark, however, he is understood to refer only to New York, which is explained by note *a* to

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page 279, where he says, what is decided a good limitation in New York would not be so in Virginia, and that the case of *Jackson vs. Chew*, 12 Wheaton, 153, which went from New York to the Supreme Court of the United States, and was decided in favor of the limitation, because the word "survivor," and the words of similar import, where used, were decided contrary to the rule of construction, and that it was a step in advance of any case foreign or domestic, except that found in the court (of New York) below. It is not pretended that if the word "survivor" had been used the limitation would be void. It is not used, and does not apply. But what is meant is, that wherever the English decisions and rule of construction prevail, the limitation over in cases like the present, has been held too remote, and the estate vested absolutely. Chancellor Kent cites numerous high authorities at p. 277, 4th vol., which must be satisfactory on this point; and he says the decisions have been uniform from the time of the year of books to the present; that the rule had been thought to be created for the purpose of supporting the testator's intention. But whatever may have been the decisions of other courts, ours has adopted the English rule in its full extent, and by it we are to decide. We think, too, upon the authority of all the books, and especially of *Bowman vs. Tucker*, 3 Humph., that by force of the words an absolute estate vested at his death in Joseph B. and his heirs, and that his death could not affect it.

But it is argued that the words "die before Thomas F." in the will, control and limit the legal meaning affixed to the words "dying without issue," and for this



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they rely on the case of *Pells vs. Brown* when the limitation over was upon the death of the first taker without issue, living William, and attempt to say that the words "living William" had no more controlling influence over the legal meaning attached to the words "dying without issue," than the words "die before Thos. F. without issue." We think that the testator did not mean a failure of issue in the lifetime of Thomas F., but an indefinite failure. Had the question been asked, if your son, Joseph B. Bates, marries and dies before Thomas F. Bates, and leaves his wife *eniente*, and a child is born in six months afterwards of the body of the wife of said Joseph B. Bates, who shall inherit this estate you have willed to Joseph B., he would have answered the child of Joseph B., undoubtedly. He had no such intention as they contend for. It is unnatural to suppose it. There is nothing meant by the word "before." The testator did not intend to be understood as meaning that Thomas F. should inherit Joseph B.'s part, if Joseph B. should die without issue in lifetime of Thomas F. And if you decide contrary to the legal meaning of the words "dying without issue," it must be by some words used by the testator showing that he intended to limit the dying without issue to a life in being, and twenty-one years and a fraction afterwards. Again, what effect can this word "before" have? Suppose that sentence in the will had been written thus: "if the said Joseph B. Bates should die without issue, then the above bequests to go to Thomas F. and his heirs," would it not have implied and meant the same as the sentence now in the will? The testator no doubt in this devise, meant to provide that if Joseph B. mar-

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ried and had children, and his generation had not become extinct until Thomas F. had been dead fifty years, and had none but grand children alive, that then the bequests to Joseph B. in the will should go to the heirs of Thomas F. He meant, as is evident by the wording of the will, to fetter and lock up his main bulk of property for years to come, and this is an intention that the courts have always been trying to prevent.

But again, we contend that by giving the land, stock, negroes, notes and cash, to Joseph B. and his right and lawful heirs forever, it vested the absolute disposal of the property, both real and personal, in Joseph B.; and in support of this position, we rely upon 10 Johns. Rep., p. 19, *Jackson* ex demise of *Brewster* vs. *Bull*; *Booker* vs. *Booker*, 5 Humph. Rep., p. 505, where this court, on p. 512, decide Albert Booker had absolute disposal of the property willed him, and cite *Jackson* vs. *Robins*, 16 Johns. Rep. Now, we earnestly contend that this is bound to be so in the case of the cash debts, and cash willed. The testator meant for Joseph B. to have the absolute disposal of them, as he goes on and provides for the collection of the notes of Josiah Morse's failing. In case of which, he gives the land to Joseph B. Now, he meant that Joseph B. should have the absolute control of the cash and cash debts, stock, &c.; and if so, the limitation over to Thomas F. Bates and his heirs is repugnant to the interest of the first taker, Joseph B., had, and is void. See 3 Humph., 635. *Thompson* vs. *McKissack*, 2 Yerger, 559. 3 Humph. Rep., *Bowman* vs. *Tucker*.

It will be seen that a large portion of the chattels, of all kinds, which testator had at his death, was willed

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to Joseph B. Now, Joseph B. had been trading upon and using these chattels one or two years, and must have converted them into other property; and if so, it could not pass by the will. It would be his own absolute property, (notwithstanding the way in which it was acquired,) as between him and his co-devisees.

The decree is erroneous. Complainants are entitled to a decree for the property, (especially the personal property,) and ought to have a decree for it. The estate is large, and if the decree is to stand, *one* of the children will take nearly all the property, and the minors and orphans will be turned out bare without the means of support. If there be any doubt in the case, it should weigh in favor of equality and natural justice.

Our supreme court have said that the same reasons do not exist here for supporting wills that do in England, as in that country the law of descents is unequal and partial; here, equal and just; and that the laws of descents ought to be favored so far as could be done.

E. L. GARDENHIRE, for the respondent, said:

Joseph Bates, in his will, made several bequests to his son, Joseph B. Bates, and then adds this clause: "Nevertheless, if the said Joseph B. Bates should die before my son Thomas F. Bates, and without issue, then the above bequest, together with the bequest made to him at the death or marriage of my wife, Polly, are to go to my son Thomas F. Bates, and the right and lawful heirs of him, the said Thomas F. Bates,

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forever." The question is, do the words import an indefinite failure of issue, or a failure of issue at the death of Joseph B. Bates.

All will agree that the words "die without issue," as these words are generally understood, mean a failure of issue at the death of the first taker. Men nearly always intend to convey this idea when they use them. We do not suppose a testator ever meant to convey any other idea by the use of them. Judges, for five hundred and seventy years, with perhaps a single exception, (the Chancellor of New York, in *Anderson vs. Jackson*.) have concurred in opinion that testators uniformly attach the restricted meaning to the words. All understand them to mean, dying without issue at the death of the first taker. Language is used by common consent as signs of our ideas. By common consent these words have the restricted meaning. With a full knowledge of this fact, by a long course of decisions, this language is perverted, and by judicial construction, made to mean an indefinite failure of issue; a thing never thought of by the testator. By this judicial construction, at war with the common understanding of mankind, a testator's property is often forced into a direction never intended to be given it, and conferred by the courts on those not the objects of his bounty. It is remarkable that this is done in the face of constant professions of anxiety to make the will of the testator effectual. We are told this construction is necessary to prevent perpetuities, that property may answer the exigencies of families, and the necessities of a commercial people. This could be effected by construing them to mean what we all understand by

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them, because it has often been decided, that if there are any explanatory words, which indicate that the testator meant a dying without issue at the death of the first taker, it is then lawful, and does not injuriously interfere with the exigencies of families, or the demands of commerce. But this is almost the universally acknowledged meaning of these words without explanatory circumstances. Courts, however, have first construed the words to mean something never intended by the testator, and then to relieve themselves of an absurdity of their own creation, they declare the bequest over void, because it tends to perpetuities. They first make an absurd meaning for the testator, and then, with a powerful stroke of judicial ingenuity, they destroy the monstrous creation of their own brain without a pang of remorse. Under the Roman law the father had unlimited power over the life of his offspring, and it is doubtless upon the authority of that law that they claim the right to destroy their own bantling. But to be serious, the course of decision upon this subject, is unworthy of the jurisprudence of an enlightened people. Hence, for three hundred years the enlightened judges of England have constantly endeavored to break in upon the old, immemorial construction upon this subject, and to sustain the limitations over as executory devises. The disposition in the United States has been equally strong, and much more effectual than in England. 4 Kent, 278-9. The current of decisions from *Fasdick vs. Carnell* to the present time, have gone that way.

And by statute in Virginia, North Carolina, Mississippi and New York, the words "died without issue"

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are to be construed to refer to the death of the first taker. Tennessee, too, by her act of January 26th, 1852, has done the same thing. In one short section she has brushed away the intolerable nonsense of six centuries. Now, these words are to be construed to mean what we all understand by them. This is indicative of public sentiment in the United States, and particularly in Tennessee, and would induce us to place as favorable a construction on this will as the authorities will warrant.

1. This is a good bequest over, because the time within which the contingency was to happen and the property vest, was in the lifetime of Thomas F. Bates. According to all the authorities since the leading case of *Pells vs. Brown*, the bequest is good. The doctrine of executory devises was slowly and cautiously admitted prior to this case. 4 Kent., 265. But since that case they have been favorites, both in England and America, for the purpose of carrying into effect the will of the testator; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then out of indulgence to wills, held good as an executory devise. 4 Kent., 265. It is an established rule that an executory devise is good if it must necessarily happen, within a life or lives in being, and twenty-one years and a fraction of another year, allowing for the time of gestation. 2 Bl. Com., p. 175, note. And whether an executory interest is created or not in a will, depends upon the testator's intention, which will prevail when not inconsistent with the rules of law. 10 Yerger, 31. 2 Yerger, 559. The inten-

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tion cannot be mistaken. It was to create an executory interest, and the contingency was to happen in the lifetime of Thomas F. Bates. The language is: "Nevertheless, if my said son, Joseph B. Bates, should die before my son, Thomas F. Bates, and without issue, then the above bequests, &c., are to go to my said son, Thomas F. Bates, forever." The contingency was that Joseph B. Bates was to die before Thomas F. Bates, and without issue, then the bequest was over. This, from the language, was to take effect in the lifetime of Thomas F. The use of the adverb of time, then, shows what the testator meant. Mr. Webster defines them to mean, at that time referring to a time specified either past or future. The time specified was the time of the death of Joseph B. Bates, before Thomas F., and without issue. At that time the bequest was to go over to him. It is but fair to presume that he meant, by the use of the word then, what it imports. The case is precisely within the principle decided in *Pells vs. Brown*. In that case, the devise was to A and his heirs forever; but if A died without heirs, *living B*, then the devise over to B. This was decided to be a devise in fee to A, the words "living B" being sufficient to make the devise over to B good as an executory devise. In that case, the essentials to support an executory devise existed; namely, in definitely limiting the time when the contingency should happen, to-wit: during the life of B. It was on this ground that the decision was made. Hammond, see in *Anderson vs. Jackson*, 16 Johns. R., p. 429.

That devise was held good because it was to take effect in the lifetime of B. In this case it is even

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more clear that it was to take effect in the lifetime of Thomas F. Bates. If J. B. Bates die before Thomas F. Bates, &c., then the bequest is to go to Thomas F. Bates.

THEN, also means soon after, or immediately. If it was to take effect soon after, or immediately, it would be good. In *Pinbury vs. Elkin*, a testator having made his will, made his wife executrix, and gave her all his goods and chattels, provided that if she should die without issue, by him, then after her decease £80 should remain to his brother J. Lord Parker held that the words imported a dying without issue at the death, and the words then after, were construed to mean immediately after. 2 Jarman on Wills, p. 443. In *Porter vs. Bradley*, "leaving no issue behind him," was held to be equivalent to "living William" in *Pells vs. Brown*. Jarman on Wills, p. 432. This case has never been denied to be law, though some of the judges in England have not approved the reasoning upon which it was made.

New York decisions sustain the view we take of this case. In *Fosdick vs. Carnell*, the will was, "that if any of the testator's sons should die without heirs male, the land should go to the survivor. The word survivor, gave the words the restrictive meaning. If J. B. Bates die in the lifetime of Thomas F. Bates, as clearly indicate that Thomas F. was to survive, as if the word "survivor" had been used. In the case of *Jackson vs. Blanshan*, 3 John. 292, the words were "if any of his children should die before they came to full age, or without lawful issue, then his or their part should be divided among the survivors." This was held good by



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way of executory devise. In *Moffat vs. Strong*, the words were, "if any of the sons die without lawful issue, then his part was to go to the survivors." Survivors here again controls the generality of the expression, because it was the intention of providing for the sons upon the contingency of either dying without issue. In *Jackson vs. Staats*, 11 Johns., 337, the words were, "if any one or more happens to die without heirs, then his or their part to be equally divided amongst the rest of the children." The court said "the plain intent of the testator was, that such parts of his estate as he had specifically devised, both real and personal, should go over to the surviving children, on the contingency stated in the will." It was likewise Bates' intention that such parts of his property as he had specifically devised, should go to his surviving son on the contingency stated in the will.

In the great case of *Anderson vs. Jackson*, 16 Johns., 381, the words were these: "If either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor." This case was elaborately argued, and all the English and American cases were reviewed, and the bequest was held good. "Survivor," doubtless restricted them to a dying without issue at the death of the first taker. If his share or part was to go to the survivor, of course it must take place in his lifetime, and this is the reasoning upon which the decision is predicated. If J. B. Bates die in the lifetime of Thomas H., then the bequest was to take effect. This must of necessity take place in his lifetime; and the reasoning in that case will support the bequest over in this.

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We will now advert to the leading cases in Tennessee on this question. In *Lewis vs. Claiborn*, the words are: "It is my will, that shall either of my daughters be dead, or die without issue, that the before mentioned lands shall be divided between the surviving ones." Judge Haywood says, if we ask what was the meaning of the testator, all mankind will give the same answer. It was, that if one of the four should die without issue living at her death, that the share should go to the survivors. This bequest was held good because it contemplated an act to be done in the lifetime of the survivors. Of course they must be alive, or they could not be said to survive, and the lands could not be divided amongst them after they were dead. "Survivors" has sometimes been held to be synonymous with "others." Sir Wm. Grant, in *Barlow vs. Salter*, 17 Ves., 479. 2 Jarman on Wills, 607. *Cole vs. Sewell*, *Ib.* 735. To be divided amongst the others would have been sufficiently restrictive. If Jos. B. Bates die before Thomas F. Bates, and without issue, then this bequest shall go to the other. But if there is any ambiguity in this case, if the bequest is to go to Thomas F. Bates, it is rendered certain. "To be divided amongst them," were thought to be restrictive, because the lands could not be divided amongst them after their death. It contemplated an act to be done in their lifetime, and so is this case. If J. B. Bates was to die before Thomas F. Bates, Thomas F. must necessarily be alive. Speaking of the New York cases to which we have referred, the Court says in this State they ought to be followed, because they are exactly suited to our circumstances, rather than the British

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decisions, for which there is good reason there, but none here, owing to the changes made in our law.

In *Williams vs. Turner*, 10 Yerger, the restrictive words are more pointed than any we have noticed. If either died, then the executor was to take back the property and divide it amongst the survivors. This would have made a good executory devise of lands, because it plainly contemplated an act to be done in the lifetime of the parties.

In the case of *Chester et als. vs. Greer et als.*, the words are that in case of the death of my daughters without issue, the limitation over was to his sister Elizabeth and her heirs forever. This was held to be a limitation upon an indefinite failure of issue, and void for remoteness. It contemplated no act, to be done in the lifetime of the parties, and it came plainly within the English rule.

In *Booker vs. Booker et als.*, 5 Humph., 505, upon various contingences, the property was to vest in the survivors. The court laid much stress upon the word survivors, and it was held a good bequest, because it plainly contemplated an act to be done in the lifetime of the parties. In this case the rule is also recognized that the words dying without issue, may be restricted to the words of the first taker, by any clause or circumstance in the will, which can indicate or imply such intention. I need hardly repeat again, that Joseph Bates certainly intended the bequest over to take effect in the lifetime of Thomas F. Bates.

It will be insisted, that the words in this will would have created an estate tail at common law, which is converted into a fee simple absolute by the act of 1784.

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This act abolishes estates tail, by enacting "that person seized or possessed of an estate tail, shall be deemed to be seized and possessed of the same in fee simple." There is no law then which could give birth to an estate tail. None can exist by words directly creating it, and none can exist by implication, for no estate can be created by implication, which cannot by law exist. The reason why the words die "without issue" in England, were construed to mean an indefinite failure of issue, was because by implication they were said to create an estate tail. And although the English judges felt bound by the plain provisions of the statute *de donis*, and would declare an entailment, whenever its provisions plainly embraced it, yet they resisted, their creation by implication with a steady hand. The danger of creating such estates here, ought to be no motive of decisions, because the act of 1784 annihilated them. The mischief which the rule was intended to cure is swept away, and there is no good reason for still maintaining the rule, according to a familiar maxim. It would now be the part of wisdom, to return to the common sense doctrine, and sustain such bequests as executory devises, and thus effectuate the intention of the parties. This construction has been established as to personal property, because it never could have been entailed. *Forth vs. Chapman*, 1 P. Williams, 663. And this doctrine has been maintained in many subsequent cases. Since the act of 1784, real property can no more be entailed than personal property. An estate tail never could exist in personalty, because if by express words, it was a fee, and if by implication it was always an executory devise. These reasons admit, that whenever property cannot be

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entailed at all, and when a devise over would otherwise fail, it must be construed as an executory devise. This was the view Judge Haywood took of this question, in *Lewis vs. Claiborne*. He says, "if it be asked why in a case of personalty, these words are restrained, by a limitation over to survivors, but in realty not, the answer is because in personalty they cannot make an estate tail, there being no such an estate in a chattle. Then if there be no such estate in realty, in this State, since 1784, will not the word "survivors," be restrictive in the latter case as well as in the former." It is so both on reason and principle.

McHENRY, for the respondent.

1. The rule is settled, that a limitation upon the first taker "dying without issue," in devises of real or bequests of personal property, and without any restrictive words or clause is void, because it is to take effect upon an indefinite failure of issue. In such devises or bequests, the first taker takes an estate tail, which is made absolute in him by our statute of 1784, ch. 22, § 5; and because such a limitation might tie up property for generations.

2. The legal sense of the words, "dying without issue," will be confined to a dying without issue, living at the time of the death of the first taker, by "any clause or circumstance in the will which can indicate or imply such intention.

3. The necessary restriction of the words, "dying without issue," was made in the will before the court. First: because the limitation over was to take effect on

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the death of Joseph B. Bates, without issue before the death of Thomas F. Bates, during his life, while he survived, or living Thomas. *Lewis vs. Claiborne et als.*, 5 Yer., 369. *Williams vs. Turner*, 10 Yer., 287. *Booker et als. vs. Booker et als.*, 5 Humph., 505. *Fosdick vs. Connell*, 1 John., 439. *Jackson vs. Blanshan*, 3 John., 292. *Moffat vs. Strong*, 10 John., 12. *Jackson vs. Staats*, 11 John., 337. *Anderson vs. Jackson*, 16 John., 381. *Jackson vs. Chen*, 12 Wheaton's Rep., 153. *Morgan vs. Morgan*, 5 Day's Rep., 517. *Den vs. Schenck*, 3 Halsted's Rep., 29. *Porter vs. Bradley*, 3 Term Rep., 143. *Pells vs. Brown*, 3 Cro. Jac., 590. Second: because the testator is presumed to have intended to create a lawful executory devise. 3 Cruise's Digest, title 38, p. 454, note. *Lewis vs. Claiborne, et als.*, 5 Yer., 369.

Third: because an equitable life-estate was limited to Thos. F. Bates. *Roe vs. Jeffery*, 7 Term Rep., 589.

CARUTHERS, J., delivered the opinion of the court.

This bill was filed by the complainants, as heirs at law of Joseph B. Bates, deceased, against Thomas F. Bates, as executor, &c., for the construction of the will of Joseph Bates, Sr., deceased. The complainants contend for a large amount of property left by the said Joseph, to his son, Joseph B., who recently died intestate and without wife or children, now in the hands of defendant, Thomas F., who claims it as executory devise, under the will of their father, the said Joseph.

Joseph Bates made his will and died in the spring of 1849. After providing for his wife, the most of his estate was divided between his sons, Joseph B. and

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Thomas F.; and he carefully provided that in the event of either dying in the lifetime of the other, without issue, the property bequeathed to that one should go to the other. And it is upon the proper construction and effect of this provision, that the present controversy rests.

The will, after describing the property, both real and personal, given to Joseph B., concludes in these words: "The above devises to my son, Joseph Benson Bates, are made to him and his right and lawful heirs forever. Nevertheless, if my son Joseph B. Bates, should die before my son Thomas F. Bates, and without issue, then the above bequest, together with the bequests made to him at the death or marriage of my wife, Polly, are to go to my son, Thomas F. Bates, and his right and lawful heirs forever."

The troublesome and vexatious question arising in this case, which has been so harrassing to the courts here and in England, for many hundred years, has now been put to rest by legislation, there and here, as to recent wills and deeds. But, as this will was made before our late act, the rights of the parties have to be settled by the old laws, and cannot be affected by the late enactment. This is clearly an executory devise and bequest; a limitation of a fee simple interest in the property to Thomas F. Bates, if Joseph B. Bates, to whom the fee is first given, should die without issue, in the lifetime of Thomas. The contingency did happen, and the question is, whether the limitation is good according to the rules of law? It is insisted that it is defeated by the rule against perpetuities, which is, that an estate limited to one, on an indefinite failure of issue of another, is void for remoteness. This rule was

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adopted upon sound considerations of policy, to unfetter estates for the promotion of commerce, and has been firmly maintained for centuries. But very great difficulty and perplexity have arisen in the application of this well settled principle. One test has been as well established as the rule. That is, that if the contingency upon which the estate is limited, must happen during the life or lives of persons in being at the time of the devise, and twenty-one years, and the ordinary time of gestation thereafter, then the limitation is good; but if it may not happen till after the time, it is bad, for remoteness, as tending to lock up estates in perpetuity. These rules are too familiar to require a reference to authorities to sustain them. But the books are crowded with controversies arising out of their application, and much apparent, if not real conflict, exists in the reported cases and elementary writers on the subject. It is not necessary, at this day, to enter into the discussion, as the subject has been exhausted even in our own cases, and nothing now remains to be said upon it. The diversity in the words used, indicative of intention, in cases which arise, is now the only source of trouble in this branch of the law.

A limitation of an estate upon the contingency of the first taker "dying without issue," or "heirs," has been uniformly held to be bad, as too remote, because these words have an artificial legal meaning, and *per se* are taken to indicate an indefinite failure of issue. Although, in this ordinary acceptance, the sense in which they would be understood by all plain men, and are most generally used by unprofessional draftsmen of instruments, they are intended to indicate a



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failure of issue, or children, at the death of the person referred to; yet, they must be taken by the court in their legal sense. So, if these words stand alone in a will they must be construed to mean an indefinite failure of issue. The meaning of the testator, however, with this exception, is a question of intention, and this fixed artificial sense of the words referred to, will be controlled by any clause or circumstance in the will, which goes to show that he meant, by the use of them, a definite failure of issue, or a failure of issue at his death, or within a life, or lives in being and twenty-one years, and a fraction thereafter.

The courts having got into a difficulty under the influence of a just abhorrence of perpetuities by a forced construction of the words, "dying without issue," have ever since been struggling to get out of it by indirection instead of boldly repudiating the error. But it is our duty to adhere to settled authorities, and declare the law as it is. Any superadded words, indicative of the intention of the testator to confine the meaning of the words "dying without issue," to the time prescribed by the rule above stated for a good limitation, will be sufficient to control the legal sense affixed to them, and save the limitation from destruction.

If the words, "living at the death," be superadded, it is sufficient by all the authorities. So, any other words, in juxtaposition, or in the context, of the same import, or indicating the same intention, will have a similar effect. Such as, if he should die without "issue" living. *Wm. Pells vs. Brown*, Cro. Jac., 590. "Should either of my children die without issue, the portion to go to the surviving children." *Booker vs. Booker*, 507.

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"If he should have issue at his death, I give the property to them, but if he dies without issue, I give it to S. and J. Hooper." *Didlake vs. Hooper*, 1 Ves. R., 194. "If either of my sons should depart this life without issue, his share, or part, shall go to the survivors." 12 Wheaton, 153. There are many respectable authorities holding that the words, "without leaving issue," or the phrase, "leaving no issue," is sufficient to sustain the contingent estate; the word, "leaving" being held to fix the period of failure to be at the death of the first taker. But this is controverted, and held not to be the law in other cases.

Mr. Fearne in the 2nd volume of his able treatises on remainders, p. 260, says: "If the limitation rests solely upon the words, 'dying without issue,' it is too remote, and therefore void, and the whole rests in the first devisee, or legatee; but that the signification of those words may be confined to a dying without issue *then living*, by clause or circumstance in the will, which can indicate or imply such intention." The same author says again, that "the courts will lay hold with avidity, of any circumstance, however slight, to support the limitations over of personal estates."

This inclination is, perhaps, more palpable in the courts of this country. It is a little singular that so much talent and ingenuity as have been brought to bear upon the subject, have proved insufficient to unloose the cords with which the courts have bound themselves, but they have at last to be cut by the legislature.

This, however, only proves the strong disposition which has ever existed in the courts to preserve uniformity of decision, and give stability to the rules of

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property. All we can do in the construction of wills made before our late act of assembly, is, to explore the face of the paper for some word, or idea, to relieve the phrase, "dying without issue," of its technical sense, and if none can be found, to give it its legal effect, and let the limitation, or contingent estate fail.

In the will before us, there can be no serious difficulty under the rules and principles above explained. The contingency on which the property is to vest in Thomas F., must, of necessity, happen during a life then in being, if at all. The clause creating the limitation, is, it will be remembered, "if the said Joseph B. Bates should die before my son Thomas F. Bates, and without issue," then the property to go to him and his heirs forever. This, then, was a good executory devise. But the limitation is protected under another, and the concluding claim in the will. This is in substance, that, in the event of the death of the said Joseph B. before Thomas F., without issue, that all the property given to the former should go to William Winton, "and be held by him in trust for the said Thomas F., during his life, and for his support and maintainance, and at his death, then to the right and lawful heirs of him, the said Thomas F., forever."

Here then is a trust to be performed by a person then in existence. Another question may here arise as to the extent of the estate of Thomas F.; whether it is absolutely by the operation of the rule in Shelly's case, or for life only, with remainder to his children or heirs at his death.

This is not now properly before us, but as the estate of Thomas F. is equitable, and that of his heirs legal,

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the rule may not operate, and make the law as declared by the chancellor correct, though not a question involved in the case before him.

On this question, however, we are not called upon now to give any opinion, and do not authoritatively settle it. The result, then, is, that the contingent limitation to Thomas F. is good, and consequently the complainants, as heirs and distributees of Joseph B., have no interest in the property.

The decree of the chancellor is therefore affirmed, and the bill dismissed with costs.

CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF TENNESSEE,  
FOR THE  
WESTERN DIVISION.

JACKSON: APRIL TERM, 1854.

WILLIAM BOON *vs.* SAMUEL LANCASTER, *next friend, &c.*

1. WILL. *Construction. Conflicting intentions.* Where the terms of a will evince a conflict of intention, the one primary and the other secondary, it is a well settled rule, that the primary intention must always prevail over the secondary. Watt by his last will and testament, probated in January, 1853, bequeathed freedom to his slaves in these words: "I direct that all my slaves be set free and sent to a free State, at my expense, as soon as possible." *Held*, that the freedom of the slaves was the primary object of the testator, which could not be defeated by the mere fact that the sending the slaves to a "free State" of this Union, (the evident meaning of the testator,) is inconsistent with the laws or comity of Tennessee; that under the act of 1853-4, C. L., which embraces all slaves who have heretofore acquired a right to freedom, but who have not been emancipated by the county court, they are required to be sent to Liberia; but that the fund for such purpose cannot be a charge upon the estate, but must be raised by hiring the slaves under the provision of said act, or from some other source.
2. EMANCIPATION. *Act 1853-4, C. L. Jurisdiction. Construction.* The provisions of the act of 1853-4, C. L., apply to any court in which a suit for freedom may be brought, as well as the circuit court. This act was doubt-

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less intended to supercede all others, as to the terms upon which the assent of the State should be given, to the emancipation of slaves, and establishes a uniform mode of proceeding, taking from the owners and the court all discretion upon the subject. They must be sent to the western coast of Africa ; there is no alternative.

3. INTERPRETATION. "*Free State.*" In a bequest of freedom under the condition or direction of transportation to a Free State, a broader meaning might well be given to those words, than to confine their sense to the Free States of this Union.
4. FREEDOM. *Bequest of.* A bequest of freedom is a distinct and substantive thing, which no power but that of the State can question.

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FROM MADISON.

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This was a bill filed in the chancery court at Jackson, upon the following state of facts :

James N. Watt, deceased, late of Madison county, made his last will and testament on the 20th of December, 1852, appointing the plaintiff in error, executor, and died soon afterwards. The will was propounded and duly probated in the county court of Madison county, at January Term, 1853, when and where the plaintiff in error was duly qualified as executor, took upon himself the execution of the will. In said last will and testament, testator made a bequest of freedom to all his slaves, in the words following : "I direct that all my slaves be set free, and be sent to a Free State at my expense as soon as possible." The slaves were Charlotte and her children, Frances, Martha, and Ellen. The plaintiff in error filed his petition as executor in the county court of Madison county, praying that the freedom of said slaves be perfected, which petition the county court refused to entertain ; whereupon the plaintiff in error joined in a petition to the chancery court at Jackson, presenting the facts of the case, and the

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William Boon vs. Samuel Lancaster next friend, &c.

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provisions of the will, and praying for a sale of the slaves for division among the heirs. The court decreed a sale of the slaves as prayed for in the petition, and this bill was filed by the defendant in error as next friend of the slaves for injunction of said sale, and praying that the freedom of said slaves be perfected under said will, and that provision be made for their transportation to a Free State at the expense of said estate. The decree of the chancellor, (Hon. CALVIN JONES presiding,) declared said slaves to be free, and directed that they be transported beyond the Union, to Liberia on the western coast of Africa, as soon as possible, and that the expenses of the same be paid by the plaintiff in error, out of the assets of the testator. From which judgment and decree the executor appealed.

M. BROWN, for appellant, commented upon 6 Yer., 119, *Fisher's negroes vs. Dabbs et als.* 3 Humph., *Hinklin vs. Hamilton*, and *Hinklin vs. Hinklin*. 5 Humph., 368, *Howard et als. vs. Clemmons et als.* 6 Humph., 122, *Reuben et als. vs. Parrish*. 8 Humph., 188, *Lewis vs. Simonton*. 10 Humph., 332, *Laura Jane vs. Hagen* administrator.

BULLOCK & SCURLOCK, contra: relied upon authorities above named, and cited Acts 1801, C & N., 277; 1829, Ib., 278; 1831, ch. 102; Ib., 279; 1842, ch. 191, § 6, N. S., 168-9; 1849, Pamph. Acts, 300; 1851-2, ch. 300, Pamph. Acts, 571, and the Act of 1853-4, ch. 4, Pamph. Acts, 121.

CARUTHERS, J., delivered the opinion of the court.

James N. Watt made his will on the 20th day of December, 1852, appointing the defendant executor, who

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William Boon vs. Samuel Lancaster next friend, &c.

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was qualified as such at the January Term of Madison county court, 1853. In the said will this clause is contained: "I direct that all my slaves be set free, and be sent to a Free State, at my expense, as soon as possible."

The said slaves are Charlotte and her children, Frances, Martha, and Ellen. They filed their bill by Saml. Lancaster their next friend, in the chancery court of Madison, to assert their rights under said will. The executor is charged with a breach of trust in not carrying out the provisions of the will in their behalf, but instead, thereof, filing a petition to sell them for distribution, which is enjoined in this suit.

The court below decreed that they should be set free, and sent to Liberia, from which the defendant appealed to this court.

It is insisted here, that the bequest of freedom was conditional; that it was only to take effect if they could be sent to a Free State of this Union, and as that cannot be lawfully done, the bequest fails, and they remain in slavery, and must be distributed by the executor. Such it is argued was the intention of the testator, and this intent must prevail; that by the term "Free State," he could not have meant Liberia, or any other foreign country. They cannot be sent to a Free State of this Union, it is contended, because of their prohibitory laws, or a rule of general comity, forbidding that one community should cast off its refuse population upon another.

1. What was the intention of the testator? He certainly very clearly expresses an intent, that his slaves should be free. But further, he intended that they



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should be sent to a Free State, at his expense. If it be conceded that he meant one of the non-slaveholding States of this Union, as he most probably did, and that they cannot be sent there, it does not follow that the right to freedom fails, and the state of bondage must continue. To take it in the strongest point of view, a case of conflicting intention is presented; the one practicable and lawful, and the other impracticable and unlawful; the one primary, the other secondary. It cannot be doubted but that his main object and purpose was to secure the freedom of his slaves, and *that*, as he expresses himself, "as soon as possible." He knew that they could not remain in this State, and therefore provided, that at the expense of his estate, they should be sent to a place where they could lawfully remain. It cannot be for a moment believed, that the particular place, to which they were to go, was a very prominent matter in his mind. If that had been so, he would, as is often done, have made it a condition, and provided for its failure, by making some other disposition of them. He certainly did not intend in any event to die intestate as to his slaves. But as a question of construction, a broader meaning could well be given to the words "Free State."

It is a well settled principle, that in the construction of wills containing inconsistent clauses, the primary provisions shall prevail against the secondary. *Lewis et als. vs. Daniel* administrator, 10 Humph., 314. In this case on account of the strong desire of the testator, evinced by frequent repetitions in his will, for the emancipation of his slaves, this intention was made to prevail over an express condition, that if they could not under the laws

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remain in the State, they should go to a named legatee. This was done, under the force of the principle above stated, in relation to conflicting intentions. This was certainly a very strong case, and can only stand upon its own circumstances. Judge Turley giving the opinion of the court remarks, "we have heretofore held that a devise of freedom is a substantive thing, whether it be recognized by the State or not; and that no one but the State can interfere in relation thereto. Upon what principle then, can this executor, or the devisee, object to this emancipation, unless it be, that the emancipation cannot be effected according to law? The slaves have acquired a right to their freedom inchoate, and they have a right to ask the protection of the law therefor, as far as it is given; they are not to be estopped by the fact that the deviser in a different clause of his will, has devised them to his executors, if they cannot be emancipated so as to remain in the State. If they chose to go out of it, what right has the executor or devisee to complain? None in our estimation whatever."

In the case of *Laura Jane vs. Hagen* adm'r., 10 Humph., 332, this court again held, (Judge GREEN, delivering the opinion,) that it has been "uniformly held that a bequest of freedom, discharged the person so emancipated from all obligation of services to the legatees or distributees of the testator, or his personal representatives, though the assent of the State may not have been obtained." The same principle is laid down and discussed in the case of *Lewis vs. Simonton*, 8 Humph., 188, by one of the present members of this court.

So whatever we might think of this doctrine, if it were an open question, it is now too firmly fixed by a

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uniform series of decisions, to be disturbed. It is true that it seems to recognize a kind of intermediate state, between freedom and slavery, which it is difficult to manage and regulate. The legislature in 1851-2, ch. 300, attempted a remedy by providing for the appointment of trustees, by the county court, to control such nondescript members of the community, by hiring them out, paying over the proceeds of their labor to them, and to be subject to all the responsibilities of master. But the operation of this act was postponed for two years; before which time it was repealed by the legislature which has just adjourned. It was certainly in contravention of the present settled policy of the State, as established by the act of 1831, ch. 102, revised by the act of 1849, ch.—, which is, that emancipation shall depend upon immediate removal from the State.

But by the act of last session, these difficulties are mostly removed, and our laws made consistent and sensible on this subject. The struggle has been to devise some plan which would be just to the slave, and not inconsistent with the interests of society, that would sustain his right to liberty, and at the same time save the community from the evils of a free negro population.

This it is believed, has been more effectually accomplished by the late act, than at any time before. It provides: "That hereafter all slaves in this State acquiring a right to freedom, whether by contract or will, shall be transported to the western coast of Africa. If the slaves be liberated by will it shall be the duty of the executor or administrator, if by contract, the duty of any justice of the peace, sheriff, clerk, constable, or register, who may have any knowledge of the facts, to

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file a petition in the circuit court of the county in which such slave resides, setting forth the facts;" copies shall be served on the slave, and former owner, &c. If a fund sufficient for transportation, and six months' support has been provided, it shall be paid into court, and if not sufficient, it shall be raised by hiring out the slaves. When the fund is sufficient, it is made the duty of the judge to notify the governor, and order the money to be paid to the treasurer of the State, subject to the check of the governor, who shall attend to their transportation, &c. The provisions of this act are made to apply to any court in which a suit for freedom may be brought, as well as the circuit court. It also extends to "all slaves which have heretofore acquired a right to freedom, but which have not been emancipated by the county court."

As this act expressly applies to the case before us, and only relates to the terms and conditions on which the consent of the State shall be given, and does not effect any existing right of others, we think this, and all other cases not disposed of by the courts, must fall under its provisions. We regard this as the most wise and judicious plan, which has been yet devised, and with some amendments, it should become the settled policy of the State. It will be seen that this act provides ample means for the court to force the funds, provided for the purpose, into court.

This act was doubtless intended to supercede all others, as to the terms upon which the assent of the State should be given, to the emancipation of slaves, and establishes a uniform mode of proceeding, taking from the owners and the courts, all discretion on the

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subject. They must be sent to the western coast of Africa; there is no alternative.

The chancery court has full and perfect jurisdiction in this case, and to that we remand the cause, to be proceeded in under the provisions of the act, to which reference has been made.

There is, however, another question in this case, which it may be proper now to decide. In addition to the legacy of freedom to these slaves, which we have seen is a distinct and substantive thing, the testator bequeaths for their benefit a sufficiency of his estate, to bear their expenses to a Free State, and as they cannot go to a Free State of this Union, which as we have said, was doubtless in his contemplation, but must be sent to Liberia, under the present state of the law, can the estate be taxed with the very large additional amount that would be necessary for the purpose? The decree of his honor, the chancellor, we think, in this respect, is erroneous. He not only threw upon the estate the expenses of sending them to Liberia, but required that an amount sufficient should be raised in that way, to keep them there six months. This we think, was not the intention of the testator; and so far as this legacy to, or for the benefit of the slaves is concerned, it must fail, with the secondary object of the will, that the slaves should go to a Free State of this Union. Although we think that this change in the policy of the State, as to the destination of emancipated slaves, as a condition upon which the consent of the State is given, cannot effect their claim to freedom; for according to the decisions to which we have referred, settling the law on this subject, no one had any right to them after the probate

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of the will, nor could any one but the State, question their perfect right to liberty, yet their right to the further legacy of their expenses, depends upon other considerations and principles. Others have an interest in the estate, which cannot be affected by any subsequent enactment of the legislature. The fund necessary to send them to Liberia cannot be raised out of the estate, but must be created by hiring said slaves, or derived from other sources under the direction of the chancery court.

TOTTEN, J., dissented.

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JOHN RAY *et al.* vs. F. G. GOODMAN.

STATUTE OF LIMITATIONS. *Seven years possession of land under title bond. Vendor's lien for unpaid purchase money. Act of 1819, ch. 28 § 2.* A possession of seven years by the vendee of land, claiming by virtue of his purchase, as evidenced by the bond for title under which he holds, gives him a right of possession that cannot be disturbed by the vendor by a bill to enforce his lien for unpaid purchase money which has been due above seven years. Such lien is barred by § 2 of the act of 1819, ch. 28.

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FROM GIBSON.

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This was a bill filed in chancery at Trenton, on the 12th of July, 1845, to enforce the vendor's lien upon land for unpaid purchase money, and for other pur-

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poses. It seems that at the time the bill was filed, the notes upon which the suit is predicated had been due more than seven years, during the whole of which time the defendant, the vendee, had been in possession of the land claiming under his title bond. At the July Term, 1852, of said court, Chancellor Jones dismissed the bill; whereupon, the complainants appealed to this court.

ISAAC B. WILLIAMS and A. McCAMPBELL, for complainants.

M. BROWN, R. P. RAINS, and M. R. HILL, for defendants.

CARUTHERS, J., delivered the opinion of the court.

There are several questions raised by the record in this case, but the one mainly argued, is, whether the statute of limitations protects the vendee of land in possession under a title bond, against a bill filed by the vendor or his assignee to sell the land for the unpaid purchase money, more than seven years after it became due.

As our opinion upon this point is decisive of the case, it is unnecessary to notice the other grounds assumed in defense.

This point arose and was decided in the case of *Lusk & Cain vs. Layne*, at Nashville, the term before last, and a written opinion delivered, which was withheld from publication, because at the ensuing term here several cases came up, including the one now

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under consideration, involving the same question, which, at the urgent request of a portion of the bar, who regarded it as a question of great importance to the community, as it certainly is, were continued for reargument at the present term.

After giving the fullest consideration to the arguments now made, and patiently reviewing the whole subject and the authorities bearing upon it, we are unable to change the opinion heretofore formed and announced.

We think a possession of seven years, by the vendee claiming the land by virtue of his purchase, as evidenced by the bond for the title under which he holds, gives him a right of possession that cannot be disturbed by the vendor by a bill to enforce his lien for unpaid purchase money, which has been due above seven years. Such lien is barred by § 2 of the act of 1819, ch. 28. The words are that no person shall have "any action or suit, either in law or equity, for any lands, tenements, or hereditaments, but within seven years next after his right to commence such action shall have come, fallen or accrued; and that all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments, shall be had and sued within seven years next after the title or *cause of action* or suit, have so accrued or fallen, and at no time after the said seven years shall have passed."

This is a suit in equity upon a *cause of action*. The object is, to take the land for the satisfaction of the notes for the unpaid purchase money on the ground of lien retained. This, then, is the "cause" and object of the present action. When did it "accrue, come, or



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fall," in the words of the act, to the complainant, or his assignee? The answer is, certainly on the day the notes became due for the consideration.

The defendant has been all the time holding for himself, and claiming under his purchase a right to the land to the boundaries prescribed in the title bond. It is an equitable title, to be sure, but still he claims to be the owner and to hold for himself alone. He certainly claims to hold against the vendor, because it is his title which he has purchased, and of which he holds a good and valid transfer in equity.

It is true that the legal title remained in the vendor, that is, he did not transfer the title according to the forms of law, and was not bound to do so until the consideration was fully paid. The vendee could not force the conveyance of the legal title without shewing that he had paid for the land, nor could the vendor force the payment of the price without making the title good. In this respect they were trustees for each other, the one for the title and the other for the money, and be dealt with as such by a court of equity. These trusts, however, in cases of ordinary title bonds, are not express, but implied. Express trusts may be certainly raised in the contract of the parties, but in the usual bonds simply for title, the trusts are only implied by law. 10 Peters., 224. So, if there be any thing in the argument that the statute will not run because of the existence of a trust which is not admitted to be beyond doubt since the act of 1819, yet it does not control this case, because we do not understand that an express trust exists in such a case as the present. If it be an implied trust, it is admitted on

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all hands, that so far as that is concerned, it presents no obstacle to the application of the statute. The limitation acts generally apply only to suits in courts of law, and are only enforced in courts of equity, by analogy, in cases of concurrent jurisdiction. There was much propriety, then, in the principle, that in cases of express trusts which were only cognizable in a court of equity, that the statute of limitations did not run. But our act of 1819 expressly applies to all suits in equity as well as law, for the recovery of land. It may, therefore, be well doubted whether any such distinction now exists in suits for land. But the view we take of the character of that trust, which exists between vendor and vendee, renders it unnecessary to decide that point.

It is argued that this relation of vendor and vendee by bond, is analogous to that of mortgagor and mortgagee, and that as the statute does not run in the latter case, it will not in the former. There is much plausibility in this argument, but it only needs to be probed to manifest its unsoundness.

It is true that the two relations are often assimilated to each other, and that they have some points of resemblance; but so far as regards the principles on which the statute of limitations are applied, there is no analogy.

The mortgagee has a lien on the land conveyed for the debts secured by the mortgage deed; so has the vendor a lien upon the land sold for the debt contracted for it; and these debts attach to the lands, have priority over all others, and cannot be defeated but by the conduct of the creditor himself. In both cases, too, the

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security for the debts passes to any one to whom the evidence of them may be assigned. In these, and some other respects, the two relations resemble each other, but in many particulars they are most dissimilar and unlike. The mortgagee only claims to hold the land as a security for his debt, and is accountable for the rents. He is bound to account. The vendee holds for himself, is not bound to account, and his title is alienable, devisable and descendable. The former holds possession for the mortgagor until the debt is paid out of the rents and profits, and may, by the nature of the contract at the time agreed upon, if the debt is not paid, have the property sold for that purpose. In the case of sale, the vendee is under no such obligation. He claims the property as his own; the rents and profits are his. The law, and not his contract, imposes the lien for the unpaid purchase money; the law, and not his contract, raises whatever trusts may exist in the case.

Now, it is believed that this view of the two relations conclusively shows that it does not by any means follow, that because the statute of limitations does not run between mortgagor and mortgagee, it does not apply between vendor and vendee.

It is clearly and uniformly held that the statute never runs, except the possession be adverse. And this, and not the question of trust, presents the only difficulty in the class of cases which we are now considering.

It is insisted that the possession of the vendee under his equitable title, is not hostile or adverse, but friendly and in subjection to the legal title of the vendor.

Let it be borne in mind that the true question is, not whether the title of the defendant is friendly to,

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and consistent with, that of the complainant, for this is the case in a sale by deed conveying the legal title, as well as by bond conveying the equitable title. 4 Peters, 506. 7 Wheaton, 535, 547, 548. We presume the only difference in the effect of the statute in the two cases would be, that in the former case a perfect title to the property would be worked out under the 1st section of the act, and in the latter, only a right to the possession under the second section.

But in either case, and, indeed, in all cases, the possession must be *adverse*. *Story vs. Saunders*, 8 Humph., 670. And what is an adversary holding of land? It is not that of a trustee, lessee, *cestui que trust*, tenant in common, or mortgagee, because they do not claim to hold exclusively for themselves, but acknowledge the right to be in others, unless, indeed, a hostile attitude is assumed to the knowledge of the true owner; in which case, the statute instantly begins to perform its office, and will *create the bar* in the prescribed time, unless suit is instituted, except, perhaps, in the single case of a mortgage; but it is the enjoyment of land, under a claim or color of right to the land, on the part of the possessor. 1 Bouv. Law Dictionary, 78. 3 East., 394. 1 Pick., 466. 1 Dall., 67. 2 Serg. & Rawle, 527. 9 Johns. R., 174. 18 Johns., 40. 5 Peters, 402.

In *Brodstreet vs. Huntington*, 5 Peters, 439, it is said by the supreme court of the United States, that "where one in possession holds for himself to the exclusion of all others, the possession so held must be adverse to all others, whatever relation in point of interest or privity he may stand in to others." Again,

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it is said, "the fact to be determined is, whether the party holds possession for himself or another." The fact of possession being proved, the only remaining enquiry is into the *quo animo*. Did he hold for himself, or, as in the case of a trustee, lessee, &c., for, or under another? If the former, it is adverse, and the statute may be set up. In the same case, it is said, "actual ouster is not requisite either to be presumed or proved;" "adverse possession may exist without it." In *Boon vs. Chiles*, 10 Peters, 224, the possession of a vendee under a bond, is *decided* to be adverse as to the property.

Now, can it, for a moment, be questioned that a purchaser of land, of which he enters into the possession, whether his title is legal or equitable, holds and claims the land as his own whether he has paid for it or not? If so, his possession is *adverse*, and therefore falls under the protection of the statute. Not the first section, by which his title would not be perfect and absolute, for want of a grant, deed, "or other assurance purporting to convey an estate in fee simple," but the second section, because he has had adverse possession for seven years without any suit at law or equity against him; or, rather, because the suit he is defending was not prosecuted within seven years after it accrued.

We are referred to cases decided by our predecessors in this court, in which the law is laid down to be, that the vendee by bond for title, by virtue of seven years' possession, "does not become owner of the fee, and clothed with the legal title as against the vendor." 2 Meigs' Dig., 749. This, we do not controvert. The

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question decided in those cases is, that the vendee does not become owner of the *fee* and vested with the *legal* title, as against the vendor; this would require the application of the first section as before stated. But the question here is, does he not become clothed with a possessory title, or right to the possession under the second section, as against the vendor and all others? None of the cases expressly negative this idea.

In *Sheratz vs. Nicodemus*, 7 Yerg., 9-13, it is decided that the vendor's lien is lost, and cannot be enforced against the vendee in possession unless a bill for that purpose be filed within seven years after the purchase money becomes due. It is true that a deed was made in that case, to the vendee; but upon principle, we can see no difference in that case and this, as regards the application of the statute, except as to the character of the title conferred by its operation as before explained. In both cases the bar is perfect; the protection complete. There is no hardship in the case. The vendor, as a creditor, has the advantage of all others, provided he exercises it in the time allowed, by filing a bill to enforce his lien; but his failure to do so, deprives him of this preference and advantage, but does not affect the validity of his debt; that is not barred, but only his lien. He has the same right with all other creditors, by pursuing the proper course to subject this, or any other equity of his debtor, to the satisfaction of his debt. But his neglect to enforce his peculiar remedy on the property in time, only reduces him to an equality with general creditors whose claims may be equally meritorious, and protects the possessor of the land according to the policy which dictated the passage of all

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statutes of limitations, except against that liability for debts to be enforced in the ordinary mode by all creditors alike.

The result is, that the decree in this case, dismissing the bill, will be affirmed.

TOTTEN, J., dissented.

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JESSE BUMPASS vs. ROBERT REAMS.

RES JUDICATA. *Chancery. Where a bill is filed to enjoin the collection of a judgment at law on the ground of usury, where the complainant had made his defense at law. Act of 1850, ch. 53.* Since the passage of the act of 1850, ch. 53, authorizing discoveries in a court of law, a defendant sued to judgment in an action at law upon a contract which he alleges to be usurious, who has had the benefit of such defense in a court of law, can have no relief in a court of equity. By such proceeding at law the matter has become *res judicata*, and the court of chancery has no jurisdiction.

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FROM MADISON.

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This was a bill filed by the complainant, Bumpass, in the chancery court at Jackson, asking a perpetual injunction against the collection of a judgment recovered by Reams against him in the circuit court of Madison county. It appears that in the suit at law, Bumpass filed his petition for a discovery, alleging that the whole note, which was the foundation of the action, was

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given for usury, and praying that Reams might be ordered to answer thereto. Reams answered that the note was given in settlement of an interest account, and admitted usury to the amount of \$17.50. The verdict and judgment was for the amount of the note and interest, less the usury so admitted. To enjoin this judgment, the complainant filed this bill. At the March Term, 1854, of the chancery court, his honor, Chancellor JONES, dismissed the bill, from which the complainant appealed.

TOMLIN, for the complainant.

M. & H. BROWN, for the respondent.

TOTTEN, J., delivered the opinion of the court.

The defendant held two notes on plaintiff for about \$700, money loaned. On the 13th January, 1840, this loan was settled by transfer to defendant of a note on one Williams, for \$700, and the plaintiff's note to defendant for \$60, due at six months.

The note for \$60 was in settlement of the interest account, and the plaintiff avers that the whole of it was for usury. The defendant denies this charge and insists that it was for legal interest, except \$17.83, which he admits was usury. This is the issue in the case. Suit was instituted on the note before Justice Sybert; a petition was filed before him by the plaintiff, Bumpass, charging the usury, with all its facts and circumstances, and calling on defendant Reams for discovery. He answered, and upon the trial the judgment was against



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him. The case was taken to the circuit court, and upon a trial *de novo* it was reversed, and there was judgment for defendant Reams, for the sum due on the note, except the usury admitted.

The plaintiff then filed this bill for relief against the alleged usury, charging the same facts which are stated in his petition. The defendant's answer is, in substance, the same as his answer to the petition; and he insists that the petition and answer in the trial at law, is a bar to the present suit in equity for the same matter.

Courts of law and equity have a concurrent jurisdiction of the subject of usury, and give the same equitable remedy; that is, remedy for the usury, and no further. 1 Story Eq. Jur., § 302. Act of 1835, ch. 50. And, therefore, upon principle, the court which first has possession of the matter must finally conclude it by its judgment, subject to revision as in other cases. And so it was held by this court, that after a trial at law, a court of equity will not entertain a bill for relief against usury, except in special cases, where on account of the complicated and embarrassed state of facts in which the usury originated and consists, the remedy at law was inefficient and inadequate for its redress. *McKoin vs. Cooley*, 3 Humph., 561. *Frierson vs. Moody*, 3 Humph., R., 565.

But this rule of decision was changed by the act of 1844, ch. 167, which declares in effect, that in usury cases, courts of equity shall entertain jurisdiction and give relief. Notwithstanding there was a trial at law, and defendant failed to make his defense, or, having made it, "failed for want of proof."

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The effect of this statute is simply this, that after a trial at law on the question of usury, the party might have a second trial in equity upon the same matter. And so, the decision of a court of competent jurisdiction was no longer conclusive in a case of usury, and the expense and delay of the litigation were increased and extended by another suit and another trial in another form, whose mode of procedure was supposed to be more adequate to give the desired relief.

Cases of usury are often involved in a series of transactions of a complicated nature difficult of proof, or known only to the parties themselves; and so, the remedy at law must "fail for want of proof." The proof is to be found only in the discovery of the usurer himself. This, a court of law, in its mode of procedure, had no power to enforce; and hence, the statute permits the injured party to institute a new proceeding in equity, where the usurer may be examined on oath, and compelled to supply the proof, for want of which there was a failure of justice in the trial at law. Such was the reason of the statute, and such its anxiety to furnish an adequate and effective remedy for an injury which it deemed so odious.

But now, it is provided by a subsequent statute, (1850, ch. 53,) that this discovery may be had in the proceeding at law, by petition, stating the case and propounding interrogatories; to which the other party is bound to make answer and discovery in the same manner as in the case of a "bill of discovery in aid of a suit at law."

The statute supplied the only defect that existed in the remedy at law, and where a discovery has been

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obtained at law under its provisions, it is no longer necessary to go into equity to obtain it. And we think it clear, upon reason and principle, that in such case a court of equity has no jurisdiction. The matter has become *res judicata* by the proceeding at law, and therefore a trial in equity would be a mere repetition of the trial at law, upon the same discovery and the same facts, and the decision must of course be the same.

We may observe, however, that if the injured party fail to make his defense against the usury in the trial at law, he is not concluded by the judgment, but may make it in equity in his own suit; for that is expressly permitted by the act of 1844, ch. 167, before referred to.

Now, in the present case, the defense of usury was made in the trial at law, aided by the defendant's discovery in his answer to the plaintiff's petition, and therefore the judgment at law is to be considered, upon reason and principle, as conclusive upon the matter in dispute.

The decree of the chancellor, dismissing the bill, will be affirmed.

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F. G. Sampson vs. B. M. Taylor.

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## F. G. SAMPSON vs. B. M. TAYLOR.

LAND LAW. *Conflict of entry and grant. Act of 1823, ch. 35.* In order to preserve the advantages of priority of entry, the same must have been made, and the grant obtained in the specified time prescribed in the act of 1823, ch. 35, or within some period of extension. These are conditions imposed by the State, and must be complied with by all who set up claim to her lands. In case of failure to conform to these conditions, the entry is voidable, the claim forfeited, and the land subject to a younger enterer. The legislature, by a subsequent extension of the time for the performance of the conditions, cannot affect the title that has vested in such younger enterer. *Vide* 5 Yerg., 236. 11 Humph., 265.

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FROM DYER.

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This is an action of ejectment for two hundred and fifty acres of land, lying in Dyer county, brought by the defendant in error against the plaintiff in error, and tried before Hon. JOHN READ at the February Term, 1854, of the circuit court of that county, resulting in a verdict for the defendant in error. On the trial below, the defendant in error produced his grant for two hundred and fifty acres of land, (described in the declaration,) issued 1st of February, 1852; he also exhibited his entry, covering the land in controversy, made in the entry taker's office of Dyer county, on the 1st day of September, 1851, with a copy of his plat and certificate of survey, made on the 1st of December, 1851; and proved that the land lay in Dyer county, that it was the same described in his declaration, and covered by his grant and entry, and that the plaintiff in error was in possession at the commencement of the suit.

The plaintiff in error then introduced and read his entry for two hundred and fifty acres of land in Dyer

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county, made and dated on the 13th day of November, 1834, on Military Warrant, No. ———, with his plat and certificate of survey made on the 1st day of April, 1852, and his grant issued on the 3rd day of December, 1852, for two hundred and fifty acres; that his entry, survey and grant, covered the land in question.

The bill of exceptions shows an agreement between the parties that the entries, surveys and grants of both are regular on their faces; and that all dates are truly stated, and that the title depended alone on the dates of their title papers. The court charged the jury that the entry and grant of the defendant in error communicate to him a good and sufficient title, and the jury found accordingly. Plaintiff in error moved for a new trial, which being overruled, he appealed to this court.

F. G. SAMPSON, for plaintiff in error.

S. WILLIAMS and M. R. HILL, contra.

CARUTHERS, J., delivered the opinion of the court.

In this action of ejectment the Court charged the jury that the plaintiff below had exhibited a good title, and they found accordingly. His title was made out by an entry in the office of the entry taker of Dyer county, on the 1st of September, 1851; plat and certificate of survey, 1st December, 1851, and grant dated 1st February, 1852, for the two hundred and fifty acres of land for which this suit was instituted.

The opposing title of defendant was an entry of the same land made on the 15th November, 1834, on mili-

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tary warrant, No. —, plat and certificate of survey made 1st of April, 1852, and grant issued 3rd December, 1852.

The only question presented, is, whether there is error in the charge, or, is the legal title in the plaintiff or defendant, under the foregoing facts. Upon this question alone, it is agreed in the bill of exceptions and the argument here, the case must turn. It is said to be a question of much importance, as the title to many tracts of land in this section of the State, depends upon it, and much hardship will result from a decision either way. We cannot look to consequences, but must declare the law.

The system of land law applicable to that portion of Tennessee lying south and west of the Congressional reservation line, so far as relates to the procurement of title, is to be found in the act of 1819, ch. 1; 2 Hay. & Cobb, 85, and the acts subsequent thereto, on the same subject, down to the present time. These lands were reserved from appropriation until 1819, when they were, by the act of that year, exposed to the satisfaction of North Carolina land claims, on the plan and upon the terms therein provided. All title to land in the reservation must be tested by the series of acts referred to, commencing with that of 1819.

There is no question but the entry of the plaintiff is lawful and regular, and his survey and grant in the time prescribed by the law. His is, therefore, a good and valid title, unless that of the defendant is paramount to it. Whether this be so we will now proceed to examine. His entry was made, as has been stated, on the 15th November, 1834, in the proper office, and

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in due form. It was, undoubtedly, the incipency of a good title to the land. By the act of 1822, ch. 35, § 9, Hay. & Cobb, 104, all entries thereafter made were required to be surveyed in one year, and the plat and certificate, after being recorded, to be returned to the register's office in six months from the date of the survey, and the grant to be issued in one year thereafter. The 10th section is, that, "In all cases of failure to comply with the provisions of this act in performing any of the duties therein severally limited, the entry shall be voidable, and liable to appropriation as other vacant lands in this State, unless the issuance of a grant be prevented by the pendency of a *caveat*, or other legal prohibition."

From the time of the passage of this act, (1823,) acts were passed at each successive session of the legislature opening the land offices for the reception of entries, and prescribing a time at which they should be again closed, and extending also the time allowed for making surveys, and obtaining grants on entries already made. In 1835 the surveyor's offices were abolished, and entry takers and surveyors for each county, provided for, upon the plan long before adopted for that part of the State north and east of the reservation line. By that act, ch. 48, § 1, the surveyors are required, under heavy penalties, to finish and close the business of their respective offices, by the 1st of September, 1836. In these county offices, all vacant land might be entered upon the terms prescribed by law. Under this law the entry of the plaintiff was made and surveyed, and granted in proper time.

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But the defendant's entry was made in 1834, and the acts extending the time to have it surveyed and granted, continued to be passed from that time by each succeeding legislature. At the next session after it was made, the time was extended for two years, ch. 37, § 1. "The act of 1848, ch. 92, allowed until 1st September, 1849; and by act of 1850, ch. 138, further time is given until the 1st day of September, 1851, for making surveys and obtaining grants on all entries heretofore made in any of the land offices in this State." It will be seen that on the day this extended time elapsed, the plaintiff made his entry. On the 13th of November, 1851, the time was again extended by the legislature to the 1st of March, 1854, ch. 326. Here, then, was a period of two months and thirteen days, when this land was, in the language of the act of 1823, ch. 35, § 10, "liable to appropriation as other vacant lands in this State." This provision of the act of 1823, has never been altered by any of the extension acts. Then, in order to preserve the advantages of priority of entry, the same must have been made, and the grant obtained in the specified time prescribed in the act of 1823, or within some period of extension. These are conditions imposed by the State, and must be complied with by all who set up claim to her lands. In case of failure to conform to these conditions, the entry is voidable, his claim forfeited, and the land subject to a younger enterer. The legislature cannot, by a subsequent extension of the time for the performance of the conditions, affect the title that has vested in the younger enterer. This, that body would have had a right to



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do, notwithstanding the time for the performance of the annexed condition had expired, in virtue of its sovereign control over all the vacant lands in the State, if no other individual right had intervened; but that having occurred by the entry of the plaintiff, such vested right is protected by the constitution, and beyond the power of the legislature.

The argument of defendant's counsel, that by the entry a right was obtained that could not be defeated, is unsound. The same law under which the entry was made, affixed conditions necessary to be performed for the maturity of the title, and on the failure of which it would be forfeited. There is, then, no ground of complaint, or any hardship in the result, because the prerequisites to make a good title were plainly declared in the same law under which the entry was made. From 1834 to 1852, the entry of defendant was permitted to slumber, and the repeated legislative invitations to perform the indispensable conditions, were entirely neglected, until the State, in 1851, re-sold the land to a more vigilant purchaser.

The principle of this case is not new, but was decided in the case of *Vaugh. & Brown vs. Hatfield*, 5 Yer., 236; and more recently in the case of *Williamson and wife vs. Troope & Luna*, 11 Humph., 265. It is true that the act of 1839, under which this last cause fell, related to entries north and east of the reservation line, and expressly declared them void as to subsequent entries, if not surveyed and granted in the designated time. But that is no stronger than the act of 1823, by which this case is governed, which provides that in the same event the older entry shall be voidable, and the

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land subject to appropriation, "*as other vacant lands.*" We are, therefore, of opinion that the plaintiff exhibited a perfect title to this land, and that the recovery was proper.

Affirm the judgment.

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WILLIAM RICHEL'S vs. THE STATE.

1. ASSAULT. *What is an assault?* An assault is an inchoate violence to another, with the present means of carrying the intent into effect. The *intention* to do harm is of the *essence* of the offence, and unless it be coupled with the attempt, there can be no assault. The intention of the party is to be ascertained by the jury from the circumstances.
2. EVIDENCE. *Evidence of intent.* The act of pointing a pistol at another within shooting distance, is not, of itself, an assault, unless the party *intended* harm thereby. It would, however, be *evidence* of an *intent* to do harm, unaccompanied by other acts or words evincive of the absence of all criminal intent.

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FROM FAYETTE.

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The plaintiff in error was indicted in the circuit court of Fayette county, at the February Term, 1854, of said court, for an assault with intent to commit murder in the first degree; was tried at the same term, and convicted of an assault. The Court, Hon. Jno. C. HUMPHREYS presiding, charged the jury, among other things, as follows: "If the jury find from the evidence, that the defendant pointed a pistol purporting to be loaded,

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at the prosecutor, within the distance such pistol would carry, notwithstanding defendant did not then or thereby intend to shoot the prosecutor, and so stated, it would be an assault, because of the fear it was calculated to excite in the prosecutor, and because of its tendency to cause a breach of the peace." To this part of the charge of the Court defendant excepted. The Court having overruled his motion for a new trial, he appealed in error to this court.

ATTORNEY GENERAL, for the State, cited 1 Russ. on Crimes, 750. 2 Humph., 458. 1 Hill, 352-3. 3 Chitty Cr. Law, 821. 1 Hawkins' P. C., ch. 62, § 1. 1 East's Crown Law, 406.

R. S. PARHAM, for plaintiff in error, cited 2 Green. Ev., 383, and refs. *State vs. Crow*, 1 Iredell Rep., 376. Bac. Ab. Title, Assault and Battery, A. 1 Russ. on Crimes, 607. 3 Black. Com., 120, notes and references.

CARUTHERS, J., delivered the opinion of the court.

This is an appeal in error from the refusal of the court to grant a new trial after a conviction for an assault. The question arises upon the charge of the Court. It was, so far as excepted to, in these words: "That the defendant would be guilty of an assault, if they found from the evidence, that he pointed a pistol purporting to be loaded, at the prosecutor, within the distance such pistol would carry, notwithstanding he did not then and thereby intend to shoot, and so stated." This is erroneous.

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An assault is an attempt or offer to do a personal violence to another. It is an inchoate violence, with the present means of carrying the intent into effect. 2 Greenleaf Ev., § 82. The intention to do harm is of the essence of the offence, and this intention is to be ascertained by the jury from the circumstances. If, at the time of menacing the prosecutor, and apparent offering to harm him, defendant used words showing it was not his intention to do it at that time, it is no assault. *Ib.*, § 83. The familiar example given in all the books treating of this subject, of one's laying his hand on his sword, saying, "if it were not assize time, I would not take such language," is an illustration of this rule.

Pointing a pistol at another, would perhaps be sufficient evidence of an intent to do harm, if nothing more appeared. But if it were shown that it was done playfully, or accompanied with a declaration that he did not intend to shoot, or any other words evincive of the absence of any criminal intent, then it would not be an assault. It would still be a question for the jury to determine, from all the facts, as to the intent. If the prosecutor had good reason, in view of all the circumstances, to apprehend danger, notwithstanding the declarations made at the time, the jury would be authorized to find the defendant guilty. For it might be well shown by the circumstances, that his disavowal of harmful intentions was insincere, or intended to put the other party off his guard.

As a matter of law, then, it is not true, that to point a pistol at another, is of itself an assault, as charged by his honor. It may, or may not be, according to the attending circumstances. These must be such

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as to satisfy a jury that there was an intent, coupled with an ability to do harm, or that the other party had a right so to believe from the facts before him; otherwise, there is no danger of a breach of the peace.

The judgment will be reversed, and a new trial granted.

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NOTE.—The Attorney General being prevented, by sickness in his family, from attending the court at this Term, JOHN M. MORRILL, Esq., of Jackson, acted as Attorney General during the term.

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H. T. RUTHERFORD *et al.* vs. WM. RICHARDSON and wife.

1. APPEAL. *From county court to circuit court on interlocutory order.* No appeal lies from the county court to the circuit court upon an order of the former, assigning dower and appointing commissioners to allot the same. If such proceeding be contested, the contestants have no right of appeal until a final disposition of the matter by the county court. *Vide, Delap et al. vs. Hunter et al., ante 101.*
2. DOWER. *Order pro-confesso against infants. Notice. Practice.* In a proceeding to have dower assigned, where there are minor children of the intestate, the proper practice, after notice of such proceeding to the minors, is, for their guardian to answer and make a true and proper defense, if any exist. The service of notice upon the guardian, and his failure to make defense, does not authorize an order *pro-confesso* against the infants.

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FROM DYER.

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This was a petition for dower, in the county court of Dyer, filed by Richardson & wife, to have the dower

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of the latter in the lands of her former husband, Sampson Smith, deceased, assigned to them. The county court made an order appointing commissioners to set apart and allot the dower; and thereupon, Rutherford and others, heirs at law of said Sampson Smith, dec'd., appealed to the circuit court of said county. At the October Term, 1853, Judge READ dismissed their appeal, believing it to be prematurely taken, and they appealed in error to this court.

F. G. SAMPSON, for the plaintiffs in error, cited and relied upon the act of 1844, ch. 99, § 1.

HILL and RICHARDSON, for the defendants in error, cited *Joslyn vs. Sappington*, 1 Tenn. Rep., 222. Martin & Yerger, 79, and 3 Yerg., 157.

TOTTEN, J., delivered the opinion of the court.

The petition was filed in the county court of Dyer, and states that Harriet, the petitioner, was married to Sampson Smith, who died intestate in August, 1840, seized of an interest in lands, and leaving his said wife and two infant children surviving him. That in March, 1841, the said Harriet intermarried with said Richardson; that she is entitled to dower in the lands of which her former husband died seized; that defendant, Rutherford, has acquired an interest in said land, subject to said right of dower; and the prayer is, that the dower be assigned.

The defendant, Rutherford, contests the plaintiff's claim, and denies her right, but the county court decreed

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that she was entitled to dower in the lands in question, and made an order for its assignment. The defendant, Rutherford, thereon appealed to the circuit court, where, on motion, his appeal was dismissed, and then he appealed to this court.

The question is, did the circuit court err in dismissing the appeal? We are of opinion that it did not. The general rule is, that an appeal or writ of error will not lie until after final judgment.

Thus, in 6 Com. Dig., 444, mar., it is said "error does not lie upon an interlocutory judgment, before the final judgment, as upon a judgment in partition, *quod partitis fiat*. Co. Litt., 168. And therefore, if the writ be sued out before final judgment, and the record certified, yet the cause is not removed to the superior court. 6 Com. Dig., 445.

The rule is the same in case of appeal. The effect of the rule is, to enable the revising court to make, in general, a final disposition of the case, instead of limiting its action to a revision of interlocutory orders, judgments and decrees, as the same may be made in its progress. The practice of revising interlocutory judgments before the final decree, would result in great inconvenience and expense to the parties. It is permitted, however, by statute in a single instance, and that is, where the principles involved in the case are settled by the decree, and an account is ordered. In such case, it is in the discretion of the chancellor to grant an appeal before taking the account. 1835, ch. 317. This is an innovation upon the general rule, and it is clear that it has no application to the present case. The act 1844, ch. 99, cited by counsel, does not affect

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the general rule. It gives an appeal from "any decree or decision of the county court" to the party aggrieved, but we are to construe it in reference to the existing law to intend a final decision or decree.

Now, in the present case, the action of the county court goes only to the extent of declaring the plaintiff's right to dower, and making an order for its assignment. But the dower was not assigned, and no right to certain and specific land was vested in the plaintiff. This remained to be done by final decree. The action of the county court, therefore, was merely interlocutory, and no appeal would lie. Second. It does not appear that the infant children of the intestate were notified of the petition.

The service of notice on their guardian, and his failure to make defense, did not authorize an order *pro confesso* against them. No *laohes* can be imputed to infants, and they cannot be in default so as to authorize such an order. After notice to the minors, the guardian should answer, and make a true and proper defense. Such is the formal practice in a case like this.

The judgment will be affirmed, and the cause remanded to the county court, to be legally proceeded in to final judgment.

Judgment affirmed.



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James Banks *et al.* vs. Miles White.

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JAMES BANKS *et al.* vs. MILES WHITE.

CONTRACT. *Rights and liabilities of lessor and lessee, where the premises become untenable pending the lease, without fault on the part of the lessor.* No warranty results by implication of law, as to the continuing condition of property demised by lease. The only implied warranty is as to title, and any acts by or under the landlord, which could affect the use of the property. Against every other event or contingency the lessee must provide by express stipulation, in order to exonerate himself from the payment of the rent.

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FROM SHELBY.

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This was an action of debt instituted by Miles White against J. Banks & Co., in the common law and chancery court of Memphis, upon divers notes given for the rent of a lot in that city. It appears, that in 1848 Miles White leased the lot to the plaintiffs in error for the term of five years, and these notes were executed for the rent, payable annually. It was stipulated in the lease, which was in writing, that Banks & Co. were to build a cotton shed upon the lot, for their occupation and use, which they accordingly did. Not long afterward, the municipal authorities of Memphis had the streets graded which bounded the lot, and thereby rendered the premises useless and untenable, and the lessees, in consequence, had to abandon them. This they did, without the consent of the lessor, which they invoked before hand. Upon the trial of the action in said court, this matter was submitted on an agreed case, to his Honor, J. C. HUMPHREYS, Judge, presiding by interchange, who decided that these facts constituted no

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defense to the notes, and gave judgment accordingly. The lessees thereupon appealed in error to this court.

T. L. SULLIVAN, for the plaintiff in error.

H. G. SMITH, for the defendant in error.

CARUTHERS, J., delivered the opinion of the court.

On the 1st day of October, 1848, Miles White made a written lease to J. Banks & Co., of the eastern half of lot 372, in the city of Memphis, for a term of five years, at a stipulated amount per annum, to be paid on the 1st of April and October of each year, for which notes were taken. Upon these notes this suit is brought. The defense is failure of consideration. The covenant required that a cotton shed should be erected on the said lot by the lessees. It appeared, that during the pendency of the lease the shed was built and occupied by the lessees. By the opening a new street on each side of said lot by the city authorities, the same was overflowed with water, and became entirely untenable and useless. It was abandoned by the lessees, and they removed the shed. It is not shown that this abandonment was sanctioned in any way, by the lessor.

The only question is, whether these facts constitute a legal defense to an action on the notes? The Court below thought not, and so do we.

The law does not imply any warranty as to the continuing condition of the property demised. The only implied warranty is, as to title, and any acts by,

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or under the landlord, which would affect the use of the property. Against every other event or contingency, the lessee must provide by express stipulation, in order to exonerate himself from the payment of the rent.

It is no defense, that the house was blown down by storm or consumed by fire; *Monk vs. Cooper*, 2 Strobb., 763; *Balfour vs. Weston*, 1 Term. R., 310; or gained upon by the sea; *Dyer*, 56; or the occupation rendered impracticable by the public enemies; *Paradise vs. Jane Alleyn*, 26; or where a wharf was swept away by the river. In a late case in the court of Exchequer, *Hart vs. Windsor*, 12 Meeson & Welsby's Rep., cases are referred to and approved, and the whole subject examined. The cases upon which the text in Chitty on Contracts, is based, and which are relied upon in this case for reversal, are there reviewed and explained, or overruled. It is there decided that there is no implied contract on the part of the lessor, that the condition of the property shall continue, or any implied condition that if it should not, the lessee may abandon, and be relieved from his contract for the payment of future rent. He is bound by his contract, and the risk is his. The law would, of course, be different where there was a failure on the part of the landlord to perform any duties and engagements incumbent on him by agreement of the parties, in consequence of which the premises become altogether, or less suitable for the purposes intended. In that case, the tenant would have a right to quit whenever he chose, and stop the rent. There can be no distinction, in principle, between the lease of houses or lands, and

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the hiring of a slave for a definite time, at a fixed price. It is a familiar rule, that in the latter case the hirer runs all risks, and is bound for the stipulated hire if the slave should die or run away from him the next day, or what is worse, fall sick and continue for the whole time a tax upon him. Very hard cases may occur, but they must be guarded against by contract.

The law, then, was correctly charged in this case, by his Honor, and the judgment will be affirmed.

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H. H. RIDLEY *guardian &c.* vs. T. W. COLEMAN *et al.*

WILL. *Nuncupation.* To make a nuncupative will valid, it must be made in substantial conformity to the requirements of law, and it must clearly appear that the deceased understood herself at the time to be making a will. So, where the deceased a few days before her death, stated in the presence of witnesses how she wished her property divided, but did not call upon any one to bear it in mind as her will, and a few hours before, had been heard to say that she wished "to fix up her affairs, but it was too late as every thing had to be recorded," such a disposition of her property is not a valid nuncupation.

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FROM CARROLL.

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This was an issue of *devisavit vel non*, submitted to a jury of the county of Carroll at the August Term, 1853, of the circuit court of said county, before Judge FITZGERALD, upon a paper purporting to be the nuncupative

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will of Absely P. Thomas, dec'd. The paper was offered for probate, the county court of said county, at October Term, 1852, by the plaintiff as administrator and guardian of the legatees, and was contested by the defendant and others, heirs at law of the decedant. It appears that the testatrix died at her residence in Carroll on the 25th of April, 1852. A few days before her death, and after the commencement of her last illness at her residence, the disposition of her property which is the subject of this controversy was made. She had been heard to say on the same morning that "she could not get well, and she wished to "fix up" her affairs, but was afraid it was too late, as every thing had to be recorded," and at the time, she stated how she desired her effects to be disposed of; a number of her neighbors were present, but none were called upon to bear witness to what she said as to her wish in reference to the distribution of her property. It seems that she had been heard some time before, to express an intention to make a similar disposition of her property. The court charged the jury that "they were called upon only to try whether the paper propounded, was the will of A. P. Thomas. That they were first to be satisfied that she intended to make a will, and secondly, that she had complied with the forms and requirements of the statutes—that a literal compliance was not necessary—that if they found she made the nuncupation, designing that the witnesses present should bear it in mind as her will and they did so, the paper would be her will. That the jury must believe from all the circumstances in the case, that the witnesses or some one of them, were called on to witness the nuncupation." There was a verdict

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and judgment establishing the will. The contestants moved for a new trial, which being overruled, they appealed in error to this court.

McCAMPBELL and WILLIAMS, for the plaintiff.

E. ETHERIDGE, for the contestants.

CARUTHERS, J., delivered the opinion of the court.

This is an appeal in error from a proceeding in the circuit court of Carroll county, in which the nuncupative will of Mrs. A. P. Thomas was established. We consider the evidence entirely insufficient to sustain the verdict in favor of the paper propounded, or any nuncupation by the deceased.

1. The proof does not show that she understood herself as performing a testamentary act, but the contrary. She certainly intended to dispose of her property by will, such was her wish and purpose for some time before and during her last sickness, as was evidenced by several conversations with her friends. At the time the testamentary act is alleged to have been performed, we cannot regard what occurred as any thing more than a repetition of her wishes and desires on that subject. We cannot believe from the proof, that she had any idea she was making a will. In confirmation of this view, is the fact that she had said the same day not long before, that she "could not get well, that she wished to fix up her affairs, but that she was afraid it *was too late as every thing had to be recorded.*" This mistake as to the law, would not of course invalidate the

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act, if she indeed considered herself as making her will; but it goes almost conclusively to show, that she did not undertake to do an act verbally, which in her opinion, could only be done by writing, and *that recorded*. It does not appear that this erroneous opinion of hers was ever removed. If it had been done, it would have been very easily proved. She could not have had reference to any other affairs, which could only be fixed up by record, because it does not appear she had any other. She must have referred to the disposition of her property by will.

It would be of most mischievous tendency, to allow loose conversations, or the bare enunciation of wishes and intentions made by sick persons, to be turned into valid dispositions of property; it would produce frauds and perjuries, and result in the most crying injustice. It is certainly true that there is a great inclination in the minds of friends, surrounding a sick bed, to seize upon almost any thing to control the disposition of property, in persuance of the known wishes of the deceased, especially when it conforms to their ideas of propriety and justice.

But it must be remembered, that by the same rules, the most unjust and improvident bequests would be sustained. The rules on this subject must be general and uniform, and cannot be made to bend to suit particular cases of merit.

The solemn act of making a will, should be well guarded and clearly made out according to the safeguards set up in the law. Under our laws, where the distribution of property is so equal and just, there is no necessity for overstraining facts and rules to avoid intes-

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tacy. The sick and feeble ought to be carefully guarded against imposition in this important matter, so as to protect those who have natural claims upon them, and to prevent the diversion of their property by improper means, from the channel prescribed by the laws of the country. It must clearly appear, that the deceased understood herself at the time, to be making a will. This we think the proof does not show.

2. It would not be sufficient if she did so intend, if the forms and requirements of the law were not complied with. The act of 1784, ch. 22, § 15, O & N., 707, requires, in order to make a nuncupative will good, that it shall be made in the presence of two witnesses, and that they or some of them, shall be specially required to bear witness thereto by the testator himself. There is no proof of any such requirement in this case. This precaution is intended to guard against the occurrence of mistakes and impositions, resulting from the loose recollection of inattentive bystanders, or any misapprehension as to the intention to make a will, or its provisions if made.

In *Baker vs. Dodson*, 4 Humph., 343, this clause in the statute was construed not to require a literal conformity in words, but that it is "sufficient, if by intelligent act and language, the testator invoke their special attention to what he is going to say, or to what he has said. If he addresses them and say, "I wish to make a disposition of my effects," and go on then and make the *factum* of said disposition, we cannot say that the statute has not been complied with."

In that case, when the two witnesses, Boyd and Hayes, came into his sick chamber, the testator addressed



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himself to them, without calling them by name, saying, "I wish to make a disposition of my effects." He then proceeded to make the disposition. Now, if he had called upon them in words to bear witness, their attention would not have been more effectually arrested, and it would have been adhering too closely to the letter of the statute, in disregard of its spirit and meaning, to have declared that insufficient.

The charge of the court, in the case before us, goes a good ways beyond this decision. He says, "if the jury find that the said A. P. Thomas made the nuncupation, designing that the witnesses present should bear it in mind as her will, and the witnesses did so, it would be her will." This leaves no meaning or force at all in the part of the statute referred to, and the jury had but one point to consider, and that was whether she made the disposition designing them to hear it, and they did hear and recollect it. This is not correct as a legal proposition, and was on a material, if not the turning point in the case, and we must think controlled the verdict, because we cannot see any evidence in the record, upon which they could have found for the will, if the law had been correctly charged on that point. In the case of *Baker vs. Dodson*, the witnesses were specially addressed with the declaration, "I wish to make a disposition of my effects," and the testator immediately proceeded to do so. In this case the witnesses say "they and others were present in the room, and after a good deal of talk about her money, and having it brought to her and taken back, &c., without addressing herself to any one or more of them in particular, she continued and made the disposition of her property." If a case

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like this could stand the important provisions of the statute referred to, so essential to prevent abuses, it would be entirely nugatory, and such construction would amount to a judicial repeal.

The judgment will be reversed, and a new trial granted.

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T. F. HUGHES vs. N. E. CANNON.

*CONTRACT. For personal service. Where the employee abandons his employer without good cause, before he has performed the whole service contracted for. To entitle a party to recover for personal services rendered under contract, he must show as a condition precedent, that he has performed the service agreed upon, or a good and sufficient reason for his failure to do so. Thus, when the plaintiff contracted to labor on the defendants farm for eight months, for a stipulated price, and after laboring for three months, voluntarily abandons his employer without his consent, merely because he could get better wages elsewhere, he can recover nothing for the time he so served.*

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FROM CARROLL.

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This cause originated before a justice of the peace in the county of Carroll, and was brought by appeal into the circuit court of that county. Cannon contracted with Hughes to work upon the farm of the latter for eight months, from the 3d of March, 1851, for the sum of \$65. After working faithfully under said contract until about the 1st of June thereafter, he abandoned said

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service, without the consent of Hughes, assigning as a reason therefor, that he was making nothing, and that he could get better wages elsewhere. It appears that about the time Cannon left, his employer Hughes was engaged in prizing tobacco, and preparing it for market; that he could not supply Cannon's place by hiring another hand, until the 1st of August following, in consequence of which, his crop of tobacco was injured to an amount exceeding the wages stipulated to be given Cannon, for the entire term of eight months. Cannon brought this suit to recover *pro rata*, for the services actually performed. Judge FITZGERALD, charged the jury that, "notwithstanding there was a special contract for the plaintiff to labor for the defendant for eight months for \$65, yet the plaintiff, after having worked a portion of the time, and without any excuse had abandoned the service of the defendant, before the expiration of the time which he had agreed to labor for the defendant, might recover in this action the value of his services for the time he so labored for the defendant. That the defendant might abate the damages of the plaintiff by way of recoupment, the damages he sustained by reason of the plaintiff's failure to comply with his contract, which would in this case be, what it would cost him to procure another hand to work in the place of the plaintiff. That he was not entitled to recover for the rotting of his tobacco, or the damage to his crop." There was a verdict and judgment for the plaintiff below, from which the defendant prosecuted a writ of error to this court.

L. M. JONES, for the defendant in error.

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T. F. Hughes vs. N. E. Cannon.

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The names of the plaintiff's counsel has not been furnished.

CARUTHERS, J., delivered the opinion of the court.

The plaintiff below contracted with the defendant to work for him on his farm for eight months, from the 3d March, 1851, for the sum of \$65. He labored under this contract until about the 1st of June, when he voluntarily quit, without the consent of the defendant, or any known cause, except that he said "he was not making anything, and that he could get a dollar per day elsewhere, and he could make more for the balance of the time he agreed to work for defendant, than the whole amount defendant was to give him. He then warranted the defendant for the value of the three months' labor, and recovered before the magistrate, and in the circuit court upon appeal.

The court charged "that notwithstanding there was a special contract to labor for eight months for \$65, yet the plaintiff might, after having worked a portion of the time, and had without any excuse abandoned the service of the defendant before the expiration of the time which he had agreed to labor for defendant, recover in this action the value of his services for the time he labored." He allows damages to defendants, by way of recoupment, for the breach of the contract, to consist of "what it would cost him to procure another hand."

This case involves an important principle, upon which there has apparently, if not really been much conflict of opinion.

The rule of the common law was, that where a party agreed by special contract to do and perform certain

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T. F. Hughes vs. N. E. Cannon.

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things for a specified consideration, he could not recover any thing without averring and showing that he had fully complied with his part of the contract or give some good and sufficient reason for not doing it. But this rule has been modified both in England and this country.

It came under consideration in this State in 1823, in the case of *Stump & Cox vs. Estill*, Peck, 175. In that case, the contract was, that Stump & Cox were to pay Estill a price agreed upon for ten thousand pounds of cotton, one half before the cotton was to be delivered, and the other afterwards. The first instalment was only paid in part, in sugar and salt, and Estill refused to deliver the cotton. They then sued him for the value of the sugar and salt. It was insisted that as the plaintiffs had not complied with their part of the contract in making the first payment, they could not recover. In this case too, the defendant had paid \$200 on the account of the plaintiffs. The court ruled that an action of assumpsit was maintainable, for the value of the articles delivered.

The next case on this doctrine, is that of *Elliott vs. Wilkinson*, 8 Yer., 411. Wilkinson agreed to build a stone chimney for Elliott, for an amount agreed upon, and if not a good one, to have nothing. He built the chimney, but it was not, according to contract, did not answer the purpose, and had to be thrown down and a new one built, in which the rock procured by Wilkinson were used. It was held that although Wilkinson could not sue upon his contract, because he had failed to perform it, yet he might recover to the extent of the benefit conferred on the defendant. Here, his rock were used in rebuilding the chimney of defendant.

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T. F. Hughes vs. N. E. Cannon.

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Again in the case of *Porter vs. Woods, Stacker & Co.*, 3 Humph., 56, the same question came up, and was more elaborately considered. Porter was a plow manufacturer near Memphis, and the defendants manufacturers of iron at Cumberland furnace. A special agreement was entered into between the parties by which Woods, Stacker & Co., were to deliver to Porter in successive years, a specified quantity of castings, of a description adapted to the construction of plows, for which a certain price agreed upon was to be paid. After the delivery under the contract, of between fifty-nine and sixty thousand pounds, they failed to go on with the contract, and a part of that delivered was imperfect and deficient, not answering the purpose for which it was intended. Under these circumstances, suit was brought for the value of the castings delivered, and their right to recover was resisted upon the ground that they had failed to comply with the contract on their part. The court decided that upon the authority of the cases in Peck and in 8 Yerger, before cited, and what is regarded "as a well settled principle in England and America," that they could recover an amount equal to the value and extent of the benefit conferred." Recoupment of damages was also allowed, within the limitations prescribed in the opinion.

By these cases it is clearly settled, as the law of this State, that a party may abandon a special contract, and sue upon a *quantum meruit*, and recover to the extent of the benefit conferred upon the other party by the materials, goods, or property of the plaintiff which have been retained or used by the defendant, without the necessity of avering or proving performance of his part

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T. F. Hughes vs. N. E. Cannon.

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of the contract. Further than this, it is believed, our cases have not gone.

It would certainly operate most unjustly, to so extend the relaxation of the common law rule, requiring the plaintiff to show the performance of the contract on his part, as a condition of recovery as to embrace a case like the present. It would encourage bad faith, and destroy the sanctity of contracts. Here is an agreement to labor eight months for a specified amount for the whole time. In view of this agreement, the employer arranges his business and pitches his crop. Before the time is half out, the employee finds he can do better, and without any other cause abandons his engagement and claims compensation for what he has done. He works in seed time, but fails to bear the "heat and burthen of the day" at harvest.

The same principle would justify an overseer at any time he chose to desert his employer under a whim, or the seduction of an offer of better wages at any period of the season, and laugh at the perplexity and injury thus inflicted upon his employer, by the disregard and abandonment of the most solemn contracts. Such cannot be the law in cases of this description.

Without impugning the rule laid down by this court in the cases referred to, where benefit has been conferred by the use of materials or valuable things furnished under contracts, we hold that it is different in the case of contracts for personal service.

In the latter case, before any recovery can be had for services rendered, it must be shewn as a condition precedent, that the plaintiff has performed the service

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agreed upon, or a good and sufficient reason for his failure to do so.

The law upon this subject is fully and correctly laid down in the case of *Jones vs. Jones*, decided at the last term of this court, and reported in 2 Swan, 606. The principle there announced, is, "that if the plaintiff voluntarily abandoned defendant's service, without sufficient cause, and against his will, he will not be entitled to recover even for the labor he had actually performed." To sustain which, reference is made to *Jennings vs. Camp*, 13 J. R., 95. *McMillin vs. Vanderlip*, 12, *Ib.*, 166. *Read vs. Moor*, 19, *Ib.*, 340. *Hoar vs. Clute*, 15, *Ib.*, 225. 2 Mass., 127; 2 East, 143. These authorities have been re-examined, and are found fully to sustain the position.

The case in 19 Johnson is almost identical with the case before us. The contract in that case, was, that the plaintiff, about the 1st of April, 1819, agreed to work for the defendant eight months for \$104, or \$13 per month. He continued to work until about the last of June following, when he refused to work any longer. The Court there say, "that the contract between the parties was an entire contract of hiring for eight months at a stipulated price. There was no claim till the expiration of the time. The work was a condition precedent, to be performed before the appellor was entitled to recover." Additional authorities to the same effect are numerous, but need not be referred to here, as we consider the principle well settled.

The judgment will be reversed, and a new trial granted.



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Montilian Scott vs. The State.

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## MONTILIAN SCOTT vs. THE STATE.

1. HIGHWAY. *Express dedication of easement by the owner of the fee. Time.* Where one lays out a street or public way over his land for the general public, and it be accepted and used by the public in the manner intended, that is a good dedication of the easement, and no deed or writing is necessary to make it valid; nor does the right to such easement depend upon its use by the public for any *definite* time. But even in such case, it ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.
2. SAME. *Where the dedication by the owner of the fee is implied only. Same.* Where the right to the easement rests upon circumstances merely, from which the consent of the owner is to be inferred, time becomes a material element in the question of dedication. The use of a way is not in itself proof of dedication. It may be without the owner's consent, or against his will, or merely temporary. But if the *user* be for a length of time, that is a circumstance tending to show the owner's consent, and the fact of a dedication, but it is not conclusive, as it may be explained.
3. SAME. *When dedication is claimed under one of several tenants in common, without the concurrence of the others.* The dedication of a highway to the public use, must be by the owner of the soil. One of several tenants in common, cannot make a valid dedication without the consent of his cotenants, either express or implied.

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FROM FAYETTE.

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The plaintiff in error was indicted in the circuit court of Fayette county, for the offense of obstructing a public road. At the October Term, 1853, of said court, before HUMPHREYS, Judge, he was tried, convicted, and by the judgment of the court, fined for said offense. He appealed in error to this court. The only question in the case was, whether the road obstructed was a public road, which turned upon the question as to a dedication by the owner of the soil; the facts as to which are sufficiently given in the opinion.

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Montilian Scott vs. The State.

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GLENN and GOODALL, for the plaintiff in error.

ATTORNEY GENERAL, with whom was RIVERS and PULIAM, for the State.

TOTTEN, J., delivered the opinion of the court.

The defendant, Scott, was indicted in the circuit court of Fayette, June Term, 1852, for obstructing a public road; was convicted and fined, June Term, 1853; and his motion for a new trial being overruled, he appealed in error to this court.

The road in question, extends from "Macon to Martin's bridge;" is a cross-road, and opens a way from one public road to another. It passes in a diagonal course, over a six hundred and forty acre tract of land, owned by the heirs of Malachi Ventriss, until December, 1850, when it was sold to the defendant, Scott, the present owner, and is very inconvenient and injurious to the owner of that land. The road was opened in Dec., 1848, under an order of the county court, by Trotter and Scott. An overseer was appointed in May 1851, who worked on the road, and kept it in order, and it was used by the public until it was obstructed and closed by defendant, on said six hundred and forty acres of land, in February, 1852.

It appears also, that the county court, at the July Term, 1851, appointed a jury of view to make report on the propriety of a change in the road, where it passes over defendant's land. They reported to January Term, 1852, in favor of a change in the road; but it was not confirmed, and no order taken upon it.

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At this term, however, the county court appointed the defendant, Scott, overseer of the *new road*, viewed by said jury, and he proceeded to open it and put it in order, which fact he certified, as overseer, to the county court, but the court, at its June Term, 1852, refused to recognize the *new road*, and ordered that the *old road* be continued and kept in order as a public road.

The new road is a half mile further, accommodates the same line of travel, is so laid out over defendant's land as to do it comparatively little injury; and being opened by defendant and put in order, he thereon considered that he had a right to obstruct and close the old road.

The State also insists that the old road was legally established and continued by dedication to the public use; and proof was adduced to support this position. It seems that Mrs. Ventriss, one of a number of heirs to whom the land descended, on being applied to, consented that a public road be made over her land; but it was not laid out, nor the line of the road fixed or agreed upon. She died in 1847, and we have seen that the road was opened in 1848. It also appears that the defendant was active in procuring this road to be opened and established.

1. As to the action of the county court in making said orders, we may observe, that it was not, in itself, valid and sufficient to establish either the old road or the new, because of incompetency of the court when some of the orders were made, and other defects and omissions in the proceeding. This seems to be conceded in the argument, and may therefore be assumed.

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Montilian Scott vs. The State.

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2. But it is insisted for the State, that the old road was legally established by dedication to the public use. The charge of the judge upon this point, was very full, and in the main, perfectly correct. And he left it to the jury to say whether there was a dedication of a right of way by Mrs. Ventriss, or by the defendant after he became the owner of the land. But as to the defendant, he said: "If the use of the road by the public, after he became the owner, was acquiesced in by him, the public would thereby acquire a right which he could not afterwards recall;" and further, in substance, that if the defendant, not then being owner of the land, was active in causing said road to be opened for the public use, he was thereby estopped, when he became such owner, to deny that the road was legally established.

The counsel for the defendant insist, that in these instructions to the jury there was error, for which the judgment should be reversed.

It is a well settled doctrine of the common law, that a public way may have a legal existence upon the principle of dedication. *Lade vs. Shepherd*, 2 Strange, 1004. *Rugby Charity vs. Merriweather*, 11 East., 376, note. *King vs. Wright*, 3 Barn. & Adol., 681. And the principle has been admitted and recognized in this State. *Young vs. The State*, 9 Yer. R., 390. If a man lay out a street or public way over his land, for the general public, and it be accepted and used by the public in the manner intended, that is a valid dedication of the easement. It consists in the right of way over the land of another, and not of an interest in the land itself; that remains in the owner of the fee, unaf-

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fectured by the dedication. Nor is any deed or writing necessary to constitute a valid dedication of the easement. It may exist by *act in pais* and *estoppel* upon the owner of the land. The right to the easement does not depend upon its use by the public for any definite time; "but it ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." *City of Cincinnati* vs. lessee of *White*, 6 Peters, 431. *Jarvis* vs. *Dean*, 3 Bingham, 447.

In *Woodger* vs. *Hadden*, 5 Taunt., 137, Chambre, Judge, says: "No particular time is necessary for evidence of a dedication; it is not like a grant presumed from length of time. If the act of dedication be unequivocal, it may take place immediately; for instance, if a man builds a double row of houses, opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway."

*Time* is a material element in the question of dedication, when the right rests upon circumstances from which the consent of the owner is to be inferred. The use of a way is not, in itself, proof of dedication. It may be without the owner's consent, or against his will, or merely temporary. If the *user* be for a length of time, that is a circumstance tending to show the owner's consent, and the fact of dedication. But it is not conclusive, and may be explained.

Now, to test the present case by these principles: First, the dedication must be by the owner of the soil. Mrs. Ventriss was one of the owners, and a tenant in common with several others, who did no act tending to prove their concurrence in the supposed dedication.

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*Montilian Scott vs. The State.*

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Without their consent, also, the dedication could have no legal existence. Nor do we think that the consent of Mrs. Ventriss was of such certain and definite character as to be of any validity. The road was not marked out, nor the line of it agreed upon; and in the absence of proof, we cannot presume her consent to a line of road so evidently and greatly injurious to her property. We think it clear, that there was no dedication by the act of Mrs. Ventriss. It was not, therefore, a public way, legally established in Dec., 1850, when the defendant, Scott, became owner of the land.

The next enquiry is, was there any dedication by him? We consider it very evident, from the facts before stated, that he had strong and urgent objections to the road, from the time he became owner of the land over which it passed. There is no proof tending to show a positive, affirmative consent to its continuance; nor can it be inferred from a supposed silent acquiescence for some six months, when he took steps to open a new road, and close the old one. He may have supposed that the old road was legally established; but in that he was mistaken, and that mistake may have been the cause of his acquiescence; but it could not take away his rights.

In this view of the case, it is clear that the former owners of the land had a right to close the road at pleasure; and when the defendant became owner under them he had the same right, unless he was estopped to assert his right in the manner stated by the judge to the jury.

We see no ground upon which the estoppel can rest. The defendant, it is true, was active in causing

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the road to be opened in 1848. It was done without authority; was a trespass upon the owners of the land, for which he was liable; and the road was never legally established.

Its use by the public was a continual wrong to the owners of the land up to the time when it was sold to defendant. Did it, then, become a public way, in which the public, or county, had a legal interest? We think not, most clearly.

As to the *estoppel*, it can only exist when it is mutual; and here, if it operate upon the defendant, so, likewise, it must operate upon the county. If the defendant is estopped to say the truth, that is, that the road was not legally established, so is the county estopped, and it becomes bound to regard the road as legally established, and to keep it in order. The right to a public way is thus made to rest upon a trespass and wrong done to the rights of others; and if the right be contested, it can only appear by proof, founded in these facts.

We think there was no estoppel, and that it was competent for the defendant to aver the truth, that the road, as a public way, never was legally established. In this view, it was not illegal for him to close it.

The judgment is reversed, and the cause remanded.

Judgment reversed.





CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE: DECEMBER TERM, 1854.

LOUISVILLE & NASHVILLE RAILROAD Co. *vs.* THE COUNTY  
COURT OF DAVIDSON *et al.*

1. CONSTITUTIONAL LAW. *County and corporation purpose.* The construction of a railroad through a county, or municipal corporation, is a county or corporation purpose, within the meaning of § 29 of art. 2, of the constitution of Tennessee.
2. SAME. *Submitting the question of a railroad tax to a vote of the people.* The reference to a vote of the people, of the question of subscription or no subscription of stock in a railroad company, as prescribed in the act of 1852, ch. 117, does not invalidate the act by bringing it in conflict with the constitution. *The powers of the legislative and judicial departments examined and expounded.*
3. SAME. *County courts. Their powers and duties under the act of 1852, ch. 117.* The act of 1852, ch. 117, regulating county subscriptions to railroads, confers no discretionary power upon the county courts to levy a tax, appropriate money, or create a debt. All this is referred to the people. The duties devolved upon said courts by said act, are, therefore, ministerial merely—not judicial. They are bound to carry out the edict of the people under the mandate of the law.
4. SAME. *Same. Jurisdiction of the quorum court.* When, by an act of the legislature a new power is vested in the county court, or a new duty de-

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Louisville & Nashville R. R. Co. *vs.* The County Court of Davidson co. *et al.*

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volved upon it, and no particular number of justices is specified, any number which may constitute a legal court, can perform it.

5. ELECTIONS. *The meaning of the words "a majority of the voters of the county."* When a question or an election is put to the people of a county, and is made to depend upon the vote of a majority of the voters of said county, the only proper test of the number entitled to vote in such election, is the result thereof, as determined by the ballot-box.
6. SAME. *When county election contested for failure of the sheriff to open the polls in one or more civil districts.* The mere fact that the sheriff failed in a county election, to open the polls in one or more precincts, does not, of itself, invalidate the election. To have that effect, it must appear also by the facts, that such failure did, or might have affected the general result of the contest. The *onus* in this respect, is upon the contestants. *Marshall vs. Kernes*, 2 Swan, 68, cited and approved as explained.
7. JUDICIAL DECISIONS. *What part of an opinion is authority.* The reasoning, illustrations, or references contained in a judicial opinion, are not authority, but only the *points in judgment*, arising in the particular case before the court. The generality of the language used in an opinion, is, therefore, always to be restricted to the case before the court, and is only authority to that extent.

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FROM SUMNER, WHITE AND DAVIDSON.

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These several cases from the counties of Davidson, Sumner and White, involving analogous principles arising under the several acts of the legislature, authorizing and regulating county subscriptions to railroads, were submitted to this court, and argued and considered together. The county court of Davidson, upon the application of the Louisville & Nashville railroad company to take stock in their road, ordered the question to be submitted to the voters of the county, whether said county court should subscribe \$300,000 to the capital stock of said company. In March, 1853, the election was held, and resulted in there being a majority of those voting, for the subscription. At the January Term, 1854, of said county court, application was made

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Louisville & Nashville R. R. Co. vs. The County Court of Davidson co. et al.

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to the court by said company, to levy a tax for the payment of the interest, &c., on said subscription. This was refused, and application was thereupon made to the circuit court, at its January Term, 1854, for a *mandamus* to compel the levy of said tax. The *mandamus* issued, and was made absolute upon a final hearing by Judge BAXTER, from which the county court appealed. The same company applied to the county court of Sumner, for a like subscription, and an election was ordered accordingly by the county court, composed of three justices, at its June Term, 1853. The election was held, and the proposition carried. At the March Term of said court, 1854, the question of issuing county bonds for the amount of said subscription was, upon the application of said company, ordered to be submitted to the vote of the people of said county. In pursuance of said order, the election was held, and resulted in a majority of the votes given, being in favor of the issuance of said bonds. In May, 1854, after said election, the agent of said company made application to the chairman of said court for the issuance of said bonds, which was refused. A *mandamus nisi* issued from the circuit court of said county, at the June Term, 1854, to compel the issuance of said bonds, which was made absolute at the October Term following, Judge BAXTER presiding; whereupon, the chairman appealed to this court. The case from White county, was a bill filed by Eli Sims and others, tax-payers of said county, in chancery at Sparta, against the South-Western Railroad Company, and others, seeking a perpetual injunction against the collection of a tax levied by the county court of said county, for the payment of the subscription of said

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*Louisville & Nashville R. R. Co. vs. The County Court of Davidson co. et al.*

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county to said railroad, which had been made in pursuance of the provisions of the act of 1852, ch. 117. At the July Term, 1854, of said chancery court, his honor, T. NIXON VANDYKE, Chancellor, dismissed the bill. The complainants appealed. All the material facts of each case are stated in the opinion.

MEIGS, WM. THOMPSON, GUILD, COOPER, and N. S. BROWN, for the Louisville & Nashville Railroad Co.

MARSHALL and BRADFORD, for the county court of Sumner.

E. A. KEEBLE and McEWEN, for the county court of Davidson.

COLMS, for the South-Western Railroad Company.

M. M. BRIEN and WASHBURN, for Eli Sims and others.

For the county courts it was argued:

1. That the election in Davidson county was void, because there was not a majority of the voters of the county in favor of the subscription. The general law of January 22, uses the words, "majority of the votes polled," while the act of February 28, requires a "majority of voters." This change of phraseology evidences a change of intent.

2. But the election in both counties was void for irregularity: In Sumner, because not advertised according to the acts; because the propositions were not there prescribed by the act, were blended and misrepresented.

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Louisville & Nashville R. R. Co. *vs.* The County Court of Davidson co. *et al.*

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In Davidson, no election was held in one of the civil districts. This is a fatal error, and makes the election absolutely void. *Marshall vs. Kerns*, 2 Swan, 68. It is no answer to say that an election cannot be attacked collaterally, because, in the first place, this election is of a peculiar character, and not between parties interested to purge the polls; and, secondly, it is not merely voidable, and therefore good until set aside, but absolutely void. This distinction is clearly made in the case referred to.

3. It is submitted, that aiding in building a railroad by subscribing for stock in a company incorporated for that object, is not a county purpose in the sense of the constitution. The very amount to be subscribed for success might deprive it of that quality. Would it be a county purpose to take stock of greater value than all the taxable property of the county? This is not the main objection. The road is not under the control of the county. The company might lawfully abandon the business of running the cars; or it might exclude the county from the benefits of the road, by having no depot in the county or its neighborhood. The institution of counties was neither for the purpose of facilitating commerce, nor encouraging manufactures, but a mere police regulation devised for the ease and convenience of the inhabitants in their individual concerns of the right of property and personal safety. They were not created by the constitution, nor the laws under it; they are recognized only in both. And looking to their original institution, and tracing their history to the present day, we can find nothing which warrants the conclusion that the extensive power conferred by the acts

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in question, is a purpose of their creation. The real gist of the act of 1852, ch. 117, is to force minorities to become subscribers to a pecuniary enterprise against their will, which is an unwarrantable interference in their private affairs, and a gross violation of the personal liberties of the people. Con., art. 1, §. 1. It is against common right, that the majority of citizens in a particular territory should subject the minority to heavy burdens against their will. A county purpose, to authorize a county tax, must be paid for out of the county treasury, and must be an adventure of the county, and under its control. A tax for a county purpose must be a county tax, that is, one that comes into the county treasury to be used for that purpose.

4. The counties in Tennessee, it is submitted, are neither corporations, nor quasi corporations, but are civil divisions of the State, under the jurisdiction of a body of men called justices of the peace, as to certain concerns, and well defined matters. By immemorial usage, these justices are considered to have perpetual succession, under the name of "justices of the county court," and to this extent, compose a court, which is, in some sense, a corporation. This corporation, under the late statutes, takes bonds payable to the chairman of the county court and his successors in office. The county court is a corporation *sub modo*, but the county is not; and the inhabitants are not corporators, but citizens, subject to be governed by the court, under the laws of the land. They have never consented, as corporators have, to be governed differently from citizens of all the counties, by reason of a vote of a majority of the county. Counties do not hold under charter,

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have no franchises, are not subject to forfeiture or dissolution, or visitation, or legislative repeal, can make no by-laws. They are civil divisions of the State; in some sense, bodies politic, with restricted powers, and, under art. 11, § 7, of the constitution, must have the same powers, and be subject to the same duties throughout the State. These powers and duties are prescribed by statute: 1827, ch. 49; 1835, ch. 6; 1837, ch. 3 and ch. 135, &c. It appears from these acts, that it is expressly incompetent for a court composed of three justices, to bind the county court by an order such as comes in question in this case. But if the statutes are silent as to the number of justices who should be present when said order was made, the decisions are, that a majority of all the justices must compose the court, and a majority of those present must make the order, and this can only be done at the quarterly courts. This is the way, and the only way, that a contract can be made by the court binding on the county. Ang. & Ames on Corp., 459, 460. 9 Humph., 266. 2 Kent's Com., 288; A. & A., 199, 215, 267, 278.

5. The acts of 1852 are unconstitutional, because the powers conferred upon the people thereby are legislative in their character, and cannot be exercised by them. The vitality of the legislation is made to depend upon the popular vote. The efficacy of the law, as well as the making of the contract, depends on the popular will. The test is, does the people, by their vote, do more than contract? If they do, it is legislation by all the cases. The distinction is, if the subscription were not lawful without the vote, the vote would not make it so. If the subscription were authorized and lawful

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without the vote, and the vote was nothing more than a contract, or the execution of, or carrying into effect a law, in full force without a vote, then it would be a good law under the decisions. 4 Har., 479. Supreme Crt. N. Y., 1834, Law Mag. Vinton county case in Ohio. It is insisted that the law in this case has no effect except by the vote, and is therefore void.

6. The acts are in fact, nothing more than a catalogue of judicial sentences pronounced by the legislature, whose execution is to take place provided the legal voters of the counties shall, by a vote, say that the taking of stock in said counties shall be a corporation purpose; and as such, is not only an encroachment on the judicial department of the government, but is an assumption of power to contract for the counties as bodies politic, and for the tax payers thereof. *State vs. Fleming*, 7 Humph., 152. The power granted to the circuit court, under the writ of *mandamus*, is contrary to the case of *Cannon County vs. Hoodenpyle*, 7 Humph., 145, and is itself, a fiat to the circuit judge to aid the legislature in executing their judicial orders to the county court. So that, the moment the legal voters make the project a corporation purpose, the legislature steps in and makes a contract for the county, and imposes taxes to pay for it; or, rather, it will have the county court to do so, upon pain of imprisonment. The substance of the attempted legislation is, that the county and county court, and circuit court, are made phantoms; and by a vote of a majority of the legal voters of a particular territory, all the tax payers become stockholders, (at any rate, under the general law,) by act of assembly.



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7. The acts are unconstitutional, because there is no constitutional power or remedy to enforce them. The legislature, in all the plenitude of its power, cannot invent a power or remedy by which the acts of 1852 can be executed, in the case the legislative agents refuse to carry them out. The constitution vests the entire taxing power in the legislature. Art. 2, § 28. By art. 2, § 29, the legislature may authorize the several counties to impose taxes for county purposes. It may authorize, but it cannot compel. The taxing power, under our constitution, is legislative, and all legislation necessarily involves the idea of discretion. When it is sought to compel the county court to levy a tax it is sought to destroy its discretion, which is impossible. The circuit judge can no more control the discretion of the county court, than he can compel that of the legislature. Both are sovereign, at least independent, on the subject of taxation. This reasoning is sustained by (in part derived from) the opinion of this Court in the case of the *Justices of Cannon vs. Hoodenpyle*, 7 Hum., 145. In that case, it was attempted to pay a debt incurred for one of the commonest of county purposes, to-wit, the erection of a court house. If the *mandamus* would avail nothing in that case, it will avail still less in this.

It was urged on behalf of the railroad companies:

1. That by the very theory of popular elections, as well as uniform usage, a majority of those actually voting controls. The consent of those who voluntarily absent themselves from the polls, to the result of the voting, must *ex necessitate*, be presumed. *Inhabitants*

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of *Sudbury vs. Stearns*, 21 Pick., 148, and cases cited. There was nothing in the acts under discussion, showing an intention on the part of the legislature to change this established principle, and uniform usage. The acts themselves were one in object: the ascertainment, in the usual way, of the popular will upon the subject of proposed subscriptions to railroad enterprises, and were so far in *pari materia*. The act of Jan. 22, requires a majority of the "votes polled," while the act of Feb. 28, uses the expression "majority of voters." The words are varied, but the sense is one.

2. The return to a *mandamus* is in the nature of a plea, and will be disallowed, if not certain and positive. Com. Dig., Mandamus D. 3. 11 Co., 99 b. 1 Har. & J., 557. 2 T. R., 456. The answer of the county court is defective in this respect, generally, but particularly in those parts referring to the proceedings preliminary to the final election on the 26th March. The *allegata* are vague, uncertain and inconsequential.

3. For the same reason, the facts relied upon to establish the irregularity of the election itself, are too indefinitely averred. Elections, moreover, cannot be attacked collaterally for irregularities, but their validity must be tested directly by proceedings instituted for the express purpose. Bac. Abr. Mandamus D. Com. Dig., Man. D. 3. Besides, the irregularities relied upon are such as occur at every election, and cannot be held to vitiate the result, without destroying the practical utility of the system. The case of *Marshall vs. Kerns*, 2 Swan, 68, relied on, has no application. That case was a direct proceeding to test the validity of the election. It was averred and shown that the polls were not opened

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at one of the precincts in the county; that not only were the resident voters in that district sufficient in number to have changed the result of the election, but that so many actually attended on the day, and at the place of voting, and lost their votes by reason of the failure to open the polls, as would have sufficed to change the result. The court was compelled to see that the election was materially affected by the irregularity. It may reasonably be presumed, however, that the decision would have been different, if the fact had affirmatively appeared that no voters did actually attend on the day of election, and that in consequence of such non-attendance, the polls were not opened, or if the majority of the successful candidate had been greater than the entire number of votes in the civil district omitted; for, in either of the supposed cases, no injury could have occurred to any one by reason of the omission or irregularity. The failure to open the polls at one precinct, in the absence of fraud, is not one particle more irregular or injurious than the admission of illegal votes; and every lawyer knows that illegal votes do not render an election void, but the polls may be purged, and the candidate having the largest number of legal votes declared elected. Popular elections would cease to be practically useful; would in fact become intolerable, if every irregularity, no matter how immaterial, should be held to vitiate the result.

4. The respondents insist that the county court cannot be empowered to levy a tax for any but county purposes, and that making a railroad is not a county purpose. The constitution (Art. 2, § 29) expressly empowers the general assembly to authorize the several

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counties and incorporated towns, to impose taxes for county and corporation purposes; and the only question which can be made is, whether building a railroad is a county purpose. The subject has been too recently discussed before this court, to justify a repetition of the course of reasoning pursued in the argument, and sanctioned by the able and elaborate opinion delivered in the case of *Nichol et als. vs. Mayor and Aldermen of Nashville*, 9 Hum. 252. The doctrine of that case has been followed in other States, whose decisions may now be added to the list cited in the opinion. *Stark vs. Maysville & Lexington R. R. Co.*, 13 B. Mon., 26. *Goddin vs. Crump*, 8 Leigh, 120. *Thomas vs. Leland*, 24 Wend., 65. *City of Bridgeport vs. Housatonic R. R.*, 15 Conn., 475. *Shaw vs. Dennis*, 6 Gil., 405. *Talbot vs. Dent*, 9 B. Mon., 530. 11 Mon., 143. *Pennsylvania vs. McWilliams*, 1 Jones, 61. *People vs. Mayor of Brooklyn*, 4 Com., 419. *Cin., Wilm. & Zanesville R. R. Co. vs. Comm. of Claiborne county*, Supreme Court of Ohio, 1852. If building, or aiding in the building of railroads, is a corporation purpose for a city, much more so is it for a county. The subject of roads is peculiarly the province of the counties as municipal corporations; and there can be no question that they may make any kind of roads the state of the country, or progress of the world may render necessary or advisable for the interest of the people.

5. It is urged in this connection, that the acts under consideration are unconstitutional, because they attempt to transfer to the people the legislative power exclusively conferred by the constitution upon the general assembly. It is unfortunate for this argument, that

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the present case falls within none of those catagories in which such legislation has been deemed questionable. There is no attempt on the part of the legislature to shun responsibility. The enactments do not go into effect upon the ascertainment of the popular will. The legislation is definite, fixed and final; a part of the law of the land without vote of the people. It is not the law, but the contract authorized by the law, that is to be submitted to the popular vote. And to whose vote? Not the citizens of the State, generally; not the voters of a grand division, or even district of the State; but to the people as members of a county; call it municipal, political, or *quasi* corporation. Ang. & Ames on Corp., 12-19. 2 Kent's Com., 274, 278. *Maury County vs. Lewis County*, 1 Swan, 236. *Justices of Cannon vs. Hoodenpyle*, 7 Humph., 146.

The county is a corporation for political and local purposes, and as such may be vested with all powers within the purview of art. 2, § 29 of the constitution. Under these acts, it was left to the people of each county as individual corporators, not to approve or confirm the law—for it is the law although every county refuses to receive its benefits—but to fix the amount of the subscription, in other words, terms of the contract. This was right and proper, and not only constitutional, but eminently just, and in consonance with our republican institutions.

Even if the vitality of the law were make to depend upon the contingency of popular approval, it is doubtful whether it would thereby be rendered unconstitutional. The argument based upon the policy of such legislation, is exceedingly unsatisfactory. It is certainly inconveient

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to be resorting, on all occasions, to the people to sanction legislation; but the argument, *ab inconvenienti*, however much it may go to the policy, cannot affect the right. Legislation dependent upon contingencies in going into operation, is by no means unfrequent. Congress, as has been well said in a recent case, often passes laws whose operation is made contingent upon the revenue laws of foreign States, on the action of foreign governments—of which the late reciprocity treaty with the British nation and her American colonies, is a notable instance—and no one has even doubted the regularity of such enactments. The popular approval does not make the law, it only fixes the time when it shall go into operation. If contingent legislation is ever justifiable, it would seem to be peculiarly appropriate under our form of government, at least, in cases where the contingency relates to the popular approval. Whatever may be the conclusion on this subject in regard to general—and the authorities are certainly conflicting, so far as such laws are concerned—there can be little difficulty when the question is narrowed down to local legislation, involving the contingency of popular approval in a matter touching the political, municipal, or *quasi* corporations called counties. Our own statute books are filled with cases where new counties have been organised out of fractions of old counties, where county lines have been changed, and county towns removed by act of the legislature, approved by the people. The authorities upon this mixed question, are collected and commented upon in a recent case, in which the vitality of such laws is ably sustained. *State of Vermont vs. Parkes*, Liv. Law Mag., for January 1855.

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6. It is urged that the levying a tax by the county court, is a matter of discretion, which cannot be controlled by the circuit court. The argument, in support of this object, goes upon the supposition that the county court, so far as the power of taxing is concerned, is a local legislature, whose discretion is unlimited and incapable of being controlled. This is assuming altogether too much. The county court is not known to the constitution. It is the mere creature of the legislature. The 29th sec. of the 2d article of the constitution, speaks of counties, not county courts. The corporate functions of a county, as a municipal body, must be exercised by some of the agents and servants of the county, and have been entrusted to the county court, but, unquestionably, they might be conferred upon the constables, as suggested by the circuit judge, or upon special commissioners, or upon the people of the county in mass. "The power to tax," says Judge REESE, (*Justices of Cannon vs. Hoodenpyle*, 7 Humph., 146,) "is not judicial, and might have been confided to any other agents, or to the people of the counties themselves." In that case it was held, that the power conferred upon the county court to assess taxes for ordinary county purposes, was a delegation of legislative power, and gave the court a discretion similar to that of the legislature itself, which discretion could not be controlled by mandamus. In this case, the discretion is entrusted, not to the county court, but to the people, in conformity with Judge REESE's suggestion. After the people have exercised the discretion vested in them by deciding to enter into the obligation, the duty of the county court becomes imperative, not discretionary. It may be added, that even in a matter ordinarily

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of discretion, the legislature might make the duty imperative, and enforce its performance through the arm of the judiciary. This cannot be doubted, without making the county court superior to the legislature. Const., art. XI, § 7.

CARUTHERS, J., delivered the opinion of the court.

The leading questions in these cases are the same, differing only in details and mode of proceeding. We will consider them together, pointing out the differences so far as may be necessary. They all originated under the acts of 1851-2, authorizing county subscriptions of stock in certain railroads. In each case, the constitutionality of those acts is brought in question. In the two first, the proceeding is by petition to the circuit court for writs of *mandamus* to compel the county courts and their chairman to perform the duties required of them in the statutes; and in the other, by bill in equity, filed by the tax-payers of White county, to enjoin the collection of the tax imposed.

In cases of so much importance, involving as these do, more than a million of dollars, and many millions more perhaps depending on the principles now to be settled in this State, it is gratifying to be able to announce that the court concur in every material proposition embraced in the record and the arguments. This is their unanimous opinion.

It is gratifying, also, to be able to say, that the cases have been argued on both sides with that ability and zeal which their great importance, the large amount involved, and the expectation of the community demand.



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By this thorough examination and masterly argumentation, on the part of counsel, the court has been much aided in its deliberations, and feel greatly indebted to it for the satisfactory conclusions at which they have been able to arrive.

The high and vital powers claimed by the legislature for itself and the counties in these acts, are well calculated to excite the deepest anxiety and solicitude in the minds of the people. It is not surprising, then, nor is it to be deprecated while circumscribed by law, that much excitement has existed, and the powers of the government subjected to the strictest scrutiny and severest tests. This comports well with the genius of our people, and is not unfavorable to the stability of their institutions. The people are, as they should ever be, jealous of doubtful, but most obedient to legitimate power. They will contest it as their fathers did, when unauthorized, or even dubious, by legal and orderly means, but submit to it cheerfully, hard as it may seem to them to operate in any particular instance, when declared in the mode prescribed in their system of government, to be within its prescribed limits. And it is most happy for the country that they are so deeply imbued with this law abiding spirit, as without it, anarchy and confusion would very soon supplant law and order in a popular government like ours, where all men have to look to the law and not to the bayonet, for the protection and safety of their persons and property. Freemen are well aware that their only safety is in the sanctity of their own laws, and all defend, appeal to, and stand by them when settled, and as settled by the tribunals constituted for the purpose, except lawless mobs

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and reckless malefactors. The suggestion, then, that *any constitutional law*, no matter how inexpedient or onerous, might be disobeyed or resisted by the people while in force, must be regarded as out of place and inapplicable. But if it were otherwise, it could not have the weight of a feather, with any one worthy of judicial position. These considerations may be mooted in the legislature, but not in the courts.

The people of this State met in convention, by their representatives, in 1834, for the purpose of forming a new constitution, or amending and altering the old one adopted in 1796, at the birth of the State. Not content silently to entrust the cause of internal improvements to the legislature under the ample powers devolved upon it for that, and all other purposes connected with their well being and prosperity, they expressly enjoined this duty upon that body in § 9 of the xi. Art. of that instrument, in these emphatic words: "A well regulated system of internal improvements is calculated to develop the resources of the State, and promote the happiness and prosperity of her citizens; therefore, it ought to be encouraged by the general assembly."

At the first session after the ratification of the constitution by the people in 1835, the turnpike system was adopted, by which the State was embarked in the cause to the extent of two-fifths of the stock necessary to build any road in which the citizens would subscribe and secure the other three-fifths. In 1837, the aid of the State was extended to one-half, to be paid, in both cases, by the issuance of her bonds. A bank of the State was created to constitute a part of the system, and to aid the cause of education, which was likewise made

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a prominent object of the convention, as appears in § 10 of the same article. This system of improvement received a severe shock in the great revulsion of the commercial world, which occurred about the time it went into effect, and was arrested by the legislature in 1839. Roads enough, however, had been built, or commenced, in the meantime, to demonstrate their effects upon the prosperity of the counties and sections through which they passed. Provision was at the same time made to aid in the construction of certain railroads, which resulted in discouraging failures. From this time for several years, the spirit of internal improvement slumbered, and the constitutional injunction remained unheeded until 1851, when the people became fully aroused again on this subject, by the spirit which actuated their convention and gave birth to the constitutional mandate copied above. A new era in the cause of improvement had, however, by this time, been ushered in, and its benefits fully tested by our sister States in the adoption of railroads for, or in addition to, turn-pikes and canals.

This system had proved itself to be as much superior to the former, as that was to the common dirt roads with their wooden causeways and melting embankments which had preceded it. It was discovered that wherever a good system of railroads had been adopted, prosperity had crowned the efforts of the people in every branch of business, and comparative darkness and inertia seemed to be settling down upon every section in which it had been neglected. This contrast becoming stronger and more glaring every year, at length aroused the State pride, and waked up the slumbering

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energies of our people to a sense of their interest. This, in 1851, resulted in the election of a general assembly which made a bold movement to recover the ground which had been lost, and overtake, if possible, in their career of prosperity, those States by which Tennessee had been so far outstripped. Her younger, as well as elder sisters, were looking back upon her in their rapid march, and jeering her supineness and apathy.

The acts now under consideration constitute a part of the system then adopted. It was provided that the bonds of the State should be loaned to the various companies then chartered, to the extent of eight thousand dollars per mile, upon the procurement of stock sufficient from individuals and other sources, to complete the roads with that assistance. To this extent, the aid of the credit of the whole State was given. But it was thought reasonable that the particular counties through which such roads might pass, in consequence of the peculiar and local advantages to them in their property and business, in addition to, and above the general benefit to the whole people, should contribute as a local community, a sum commensurate with such extra benefit, to be determined by themselves. To carry out that view, which seemed to be reasonable and just, these acts were passed. The first provision, by which a debt to be paid by all the people of the State is created, is based upon the consideration that the benefits of the system will be diffused throughout the whole, and certainly all are interested in the prosperity of any part of a community. The second provision goes upon the very reasonable conclusion, that if

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such improvements be a blessing, those who are nearest to them are the largest participants; that is, the benefits derived are, as a general rule, in proportion to the proximity to them. If this be so, if the legislature were right in this conclusion, it is difficult to controvert, successfully, the justice and equity of this regulation, if it had the power, under the constitution, to make it. But we are not to be understood as intimating that we have any power to base our action upon the inexpediency, injustice, or impolicy of the enactments of that body, if they be not in conflict with the supreme law. And whether these acts are forbidden by that law, is a grave and important enquiry, upon which we will now enter.

The general statute passed January the 22nd, 1852, ch. 117, which is made applicable to all the counties of the State, and under which the counties of Sumner and White proceeded, is in substance, as follows: Sec. 1 makes it lawful for any county court, through their chairman, to subscribe for stock in any railroad which may pass through its county, or be contiguous thereto. Sec. 2 forbids such subscription, until the approbation of a majority of "the legal voters of the county" is obtained, by an election to be ordered by said court, and to be held by the sheriff, after giving at least thirty days notice in writing, at all the places of holding elections in the county; "which advertisement shall specify the amount of stock proposed, and when payable." "And if a majority of the votes polled be "for subscription," the chairman of the county court shall carry into effect the will of the majority, and shall subscribe the amount of said stock so voted for." If

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the vote be adverse, then the question is not again to be propounded within six months; and not then, without a concurrence of a majority of all the justices of such county. Sec. 3 makes it the *duty* of the county court to order such election, upon the application, in writing, of a majority of the commissioners of such road; or, if organized, by the board." "Said elections shall be held and conducted as the county court shall direct." Sec. 4 provides that such monies shall be expended within the county, or as near thereto as practicable, if the charter and existing obligations of said company will permit. Sec. 5. That when such stock is taken, it shall be the duty of the county court to levy the necessary taxes for that special purpose. Sec. 6 makes provision for the collection of the tax. Sec. 7 prescribes the duty of the clerk in making out a tax list. Sec. 8 prohibits the collection of more than thirty-three and one-third *per cent.* of such subscription in any one year; requires it to be paid to the treasurer of the company as it may be collected; the collector to give the tax-payer a certificate of the amount paid by him, "which may be traded, assigned or transferred," and "*shall be* receivable in payment of freight or passage" on said road. Said certificate to be countersigned by the clerk of the county court, and shall entitle the holder to receive a certificate of stock in such road, and to become a stockholder when the amount of one or more shares may be presented. Sec. 9 provides that upon the subscription of the stock so voted by the people, the county court may appoint a proxy to represent it in all the proceedings of the board. Secs. 10 and 11 provide for settlements, &c., with the tax collector, and

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prescribe certain duties to the clerk. Sec. 12. If no railroad fund be in hand at the making of any unexpected call by the company, the county court is to issue "county warrants" at interest, to the board, which shall be redeemed at the county treasury at such time as may be agreed upon. Sec. 13 extends the privileges of the act to incorporated cities and towns. Sec. 14. "*Be it enacted*, That the circuit courts of the State, shall have power to issue a writ of *mandamus*, to compel said county courts to carry into effect the provisions of this act, so far as is incumbent on said county courts so to do." Sec. 15 fixes the fees of the collector and clerk, and requires the court to add to the amount of stock voted and subscribed, a sum sufficient to cover such expenses of collection.

The petitioner or relator is a corporate body, made so by an act of the legislature of Kentucky; and by an act of the general assembly of Tennessee of 1851, a right of way is granted to it through this State, so as to connect the cities of Louisville and Nashville, with sundry limitations and conditions, all of which have been accepted.

At the June Term, 1852, of Sumner county court, the board of said corporation, by its President, L. L. Shreve, petitioned said court in writing, to order a vote of the people on the question of subscribing \$300,000 of stock in said road, upon the terms prescribed by the act of assembly. The petition was granted, and the Court, consisting of three justices, only, present, made the order following: "Ordered that the sheriff and his deputies shall advertise for at least thirty days, and open the polls for said legal voters, and hold an

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election upon Saturday the 24th of July, 1852, at the various election grounds of the civil districts of Sumner county, submitting the following propositions to said legal voters, which shall be embraced in said advertisements, to-wit: That the county court of Sumner shall subscribe stock to the amount of \$300,000, payable in five equal annual instalments, from the 1st day of January next, in the Louisville and Nashville Railroad Company, agreeably to the provisions of said act, upon the following conditions: That said railroad company shall permanently locate said railroad so as to make the town of Gallatin a point on the same, by the 1st day of September next. If said company shall fail to make said location by the 1st of September, 1852, and by writing notify the chairman of the county court of said location, then the county court shall subscribe the said sum of \$300,000 of stock in the Nashville and Cincinnati Railroad Company. In either case of the subscription of said stock, the money so subscribed shall be expended in the county of Sumner agreeably to the act. The sheriff shall hold said election under the law governing elections for governor, members of Congress, and the general assembly."

The list of voters was to be reported to the next court, and if it appeared from the report to the sheriff that a majority was for subscription, the chairman was to subscribe for the stock according to the order. It appears from the minutes of the court, that a petition had also been made by the commissioners of the Nashville and Cincinnati road, at the same time and of the same tenor of the other. Judges to hold the election at each precinct were appointed by the court. The



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certificate of the sheriff was produced to the quorum court at August Term, by which it appeared that he had held the election as required by the order of June Term, and that there were 1,128 affirmative, and 1,022 negative votes—majority 106. The conditions set forth in the order of the court of June Term, were complied with by the board of the Louisville and Nashville company, in the time required, and George A. Wyley, as chairman, made the subscription. All of which, with the correspondence, was reported to the August Term, and entered upon the minutes, and his action was ratified and confirmed by the court. The said Wyley is then appointed proxy for said county, to act for it in the board.

On the 30th of December, 1853, the Legislature passed a special amendatory act, to authorize the county of Sumner to issue her bonds, in payment of her subscription of \$300,000, at not less than ten nor more than twenty years at six *per cent.* interest, provided the company would receive them in payment, and the people should vote for the change in the mode of payment thus prescribed. In this event, it is made the duty of the chairman of the court to sign and deliver the bonds. An election was ordered by the court, which resulted in a majority for the change.

Application was then made to the chairman, James P. Taylor, for the bonds and refused. Thereupon this petition was filed in the circuit court for a *mandamus* against said chairman and the justices of the peace of Sumner county, commanding the former to issue the bonds, or that the county court be compelled to levy a tax to pay the subscription. Process was served on all

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the justices. A minority of them answer, consenting to the prayer of the petition, and a majority concur with the chairman against it, and in the assignment of causes against the issuance of the writ of *mandamus*. The writ was awarded by his honor, the circuit judge, and an appeal in error to this court.

The first and most prominent in the order in which we will consider them, is, that the said acts of 1852 and 1853 are unconstitutional.

1. Because they delegate a power involving taxation to the counties for an object not local. Whatever doubts may exist upon the abstract question of the authority of the law-making department, to delegate any portion of its power to the subordinate civil divisions of the State, or town corporations, such doubts cannot arise here because this authority is expressly given in our constitution in specified cases, as to local matters generally. By art. 11, § 8, the Legislature "have a right to vest such powers in the courts of justice, with regard to private and local affairs, as may be deemed expedient."

2. As to the taxing power, the most important and delicate of all the legislative powers, art. 2, § 29, confers upon the legislature "the power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law."

It is not, nor can it be controverted, that this last section fully covers and sustains the act in question, if the railroad be properly a "county purpose." But it is insisted in the argument, that it is not so in the sense of the constitution. It is no easy matter to affix a clear and definite meaning to this phrase. It is less difficult

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to state cases which do, and others which do not fall within it, than to draw any exact or palpable line between them.

There would be no diversity of opinion on the proposition, that court-houses, jails, poor-houses, and common roads, and bridges, by which they are made accessible to the people, are "county purposes," and that hotels, mercantile, trading, banking, and manufacturing establishments would not be, although they may be highly necessary for the comfort and prosperity of the people at large. These are—as they should be—left to private and voluntary enterprise, and cannot, in any just sense, be regarded as public or county purposes. Nor is there any necessity that it should be otherwise, because the prospect of gain will always attract sufficient private capital into those channels. Such enterprises will generally advance with the wants and demands of the community, independent of public aid. No authority exists, then, for the delegation of power to counties and corporations to levy taxes for such purposes; and an act to that effect, as well as any action under it, would be nugatory. We had a case before us at the present term, *Steadman vs. The Mayor and Alderman of Galatin et als.*, in which the question was, as to the power of a town corporation to issue their bonds, and levy taxes for stock in a woollen and cotton factory within their limits; and were prepared to decide that this was not a corporation purpose, within the meaning of the constitution, and therefore an act of assembly giving them the power, would have been void; but as the action in that case was without any statute specially conferring the power, it was only necessary to decide,

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that by the general corporate powers of the town, corporation debts could not be contracted, or taxes levied for such purposes, and consequently the bonds were void, and could not be forced upon the contractors, who had specially agreed to take them in payment.

But the question recurs. Is a railroad a "county purpose"? If this question cannot be answered in the affirmative, the act of 1852 is unauthorized by the constitution, the whole proceeding is a nullity, and the *mandamus* must be refused.

One of the first wants, next to the necessary means of subsistence, in any community, is some mode of reaching each other for social or business intercourse, and mutual assistance and advantage. Wild animals have their trails, the Indian his path, and the white man his roads and bridges. These are indispensable in the rudest organizations of society, for both private and public purposes. The tiller of the soil needs them to go to the mechanic for his tools, and the mechanic to go to the farmer for his supplies, and both to reach the trader and the merchant for purchase, barter, and exchange, and all together, must have them to pass to and from places set apart for public business or worship. As society advances in civilization and wealth, its necessities in this regard continue to increase, and greater and still greater facilities for intercourse of this kind are demanded. Roads which would suffice for a population of hundreds concentrated at a few points, and making but a small amount for market, would not answer for thousands covering the whole face of the country, and rolling up millions of produce for transportation. The advance may be, and generally is,

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gradual in this, as in most other things; but it is as steady and sure as any other kind of improvement which results from the wants and urgent necessities of a people. So the common dirt road for wagons is superseded by turnpikes, and these again by the railroad. They are all designed for the same purpose; the passage of persons on business or pleasure, and the transportation of property. They are for the use and benefit of the people locally and generally. Blessings innumerable, prosperity unexampled, have marked the progress of this master improvement of the age. Activity, industry, enterprise and wealth seem to spring up as if by enchantment, wherever the iron track has been laid, or the locomotive moved. But like most other temporal benefits, it has to be purchased "at a great price." Individuals who have the spirit to do it, are not often sufficient for the task, and everywhere it has been found necessary, by some means, to command the aid of corporations, counties, States, whole communities. Such is the system adopted in our State, of which the act under consideration is a part. The State subscribes \$8000 per mile, (now \$10,000, by act of the last legislature,) the counties on the line of the roads, and individuals, both natural and artificial, everywhere, as much as they choose, no more, no coercion, except to enforce such engagements as they may voluntarily make.

Here, then, is a road to pass through the county of Sumner, touching her seat of justice, bringing to the doors of her citizens all the necessities and luxuries, both of the north and south, transporting all their surplus productions to the best markets, and her people wherever interest, business, or pleasure may call; and

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all this with that great dispatch which steam alone can impart to matter, and before which space dwindles into a point, and the people of distant States are brought into daily communication.

If, then, an ordinary dirt road, or less common turnpike road, is a "county purpose," and a proper subject of county taxation, as well as bridges over their streams, because they are local benefits to the people, coupled with an advantage to the public generally, having occasion to pass over them, how can it be said that a railroad is not, which answers all these purposes so much better, and produces a state of prosperity of which they are entirely incapable? Both are roads in the county, and we cannot argue, that because one is better, and more costly, if you please, than the other, the building of it shall not be regarded as a county purpose. Nor can the fact, that it runs into, or through other counties or States, or is owned or managed in whole or in part by others, deprive it of this character. This objection has never been urged, and could not be successfully, to a dirt or turnpike road, and applies with still less force to this. The length and magnitude of the work can only increase the local advantage to every point it may pass. It is the thing, and its objects and purposes, which defines its character in this respect, and not its extent and magnitude.

But this is not a question of the first impression, though we have thus far considered it in that light. The same question, in principle, came up, and was decided by this court, in the case of *Nichol vs. The Mayor and Aldermen of Nashville*, 9 Humph., 252. It was there determined, that an act of the legislature

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authorizing the corporation of Nashville to take half a million of stock in the Nashville and Chattanooga railroad, and issue bonds and levy taxes to pay for the same, was sustained by the clause of the constitution now under consideration, because that was a "corporation purpose." The road had its termination at or near the limits of the corporation. The reason given, among others, was, that it tended largely to promote the business and prosperity of the city. Now, if that was a corporation purpose, is this not a county purpose? Is not this the strongest case? This road passes through the whole county, as well as the corporation of the seat of justice in the centre. The same question has often been up in other States, and it is believed that there is but little, if any conflict in the decisions. The question should be regarded by the courts as settled and forever put to rest. Some of the cases, however, have gone further than we would be willing to go, or than this case requires.

The common argument, that the power of a county or town corporation is confined to their limits, has been everywhere met and refuted or exploded. And the kindred argument, that to constitute a town or county purpose, the improvement or object for which the people are taxed, must be entirely within their borders, has suffered the same fate. 9 B. Monroe, (Ky.,) 526. 5 Gilman, (Ill.,) 405. 1 Jones, (Penn.,) 70. 4 Comstock, (N. Y.,) 419-20. Ohio Reps., 609 to 625. *Goddin vs. Crump*, 8 Leigh, (Va. R.)

2. It is, however, contended, secondly, that if this be a county purpose, still these acts are in conflict with the constitution, because they are not final and obliga-

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tory, but depend, for their vitality, upon the vote of the people; and that this is a transfer of legislative power to the people, which is contrary to our republican system of government, as set up in the constitution, as well as its genius and cardinal principles.

With these latter tests, it may be remarked, we have nothing to do, except so far as they may tend to illuminate what is written in the constitution. If the construction and administration of our laws, *supremé* or subordinate, were to be governed by the opinions of Judges as to the genius or general principles of republicanism, democracy, or liberty, there would be no certainty in the law; no fixed rules of decision. These are proper guides for the legislature where the constitution is silent, but not for the courts. It is not for the judiciary or the executive department to enquire whether the legislature has violated the genius of the government, or the general principles of liberty, and the rights of man, or whether their acts are wise and expedient, or not; but only whether it has transcended the limits prescribed for it in the constitution. By these alone, is the power of that body bounded; that is the touch-stone by which all its acts are to be tested; there is no other. It would be a violation of first principles, as well as their oaths of office, for the courts to erect any other standard. There is no "higher law" than the constitution known in our system of government. If that does not conflict with, or forbid an act of the legislature, to which all the law-making power is confided, there is no correction, no matter how unwise or oppressive, but by the action of the people at their next election. The courts, in attempting to obstruct, or failing to enforce



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such a law, would be guilty of usurpation of power and treading on forbidden ground. It would result in a ruinous conflict of authority, obliterate the boundaries of power, and mar, if not destroy, the harmony of that beautiful and well balanced system of government with which we are blessed beyond all other ages or countries. No temporary evils, be they ever so oppressive, would compensate for the introduction of a principle fraught with so much danger into our jurisprudence. Then, if we were of the opinion that the act in question was of the most unwise, unjust, oppressive and ruinous character, and yet, was not forbidden by the organic law, but fell within the scope of legitimate legislative action, we could not arrest, but would be solemnly bound to enforce it. For the consequences, we are not responsible. We have no more power to repeal or disregard, than to make law. Our functions only extend to their construction and enforcement. But, on the other hand, it has become an axiom in our jurisprudence, now no where disputed, and every where adopted and acted upon, that the courts have power, and it is their duty to pass upon the constitutionality of an act of the legislature, and declare it nugatory, if there be an irreconcilable conflict. Yet, the rule is, as generally recognized, that it would be inconsistent with that comity and confidence which should ever subsist between co-ordinate departments of the same government, and the high respect due both to the intelligence and honesty of the people's chosen representatives, not to decide upon their acts with every presumption in favor of their validity, which should be overcome only by the clearest convictions of judgment, after the most grave and

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mature examination and profound reflection. 3 Dallas, 171. 4 *Ib.*, 14. 8 Cranch, 87. 14 Mass., 345. 11 Penn. R., 70. 2 Monroe, 178. 9 Dana, 514.

The admitted theory of our government, is, that all power of every kind, is derived from the people, as the natural source, or fountain. In every government, no matter by what name called, or whether vested in one or many persons, these powers are naturally divided into three classes; the legislative, the law-making; judicial, the law-expounding; and executive, the law-enforcing. These three departments embrace all the powers of government. They were, in the construction of our system by the people, wisely vested in these distinct co-ordinate departments above enumerated, and to be exercised by different persons, or bodies of men. Their union is tyranny; their separation, the only guarantee of liberty. The boundary lines between them were as distinctly marked as the nature of the case would admit. Each was made sovereign in its sphere, but powerless beyond it. They are all agents of the people, and the constitution their power of attorney. All acts beyond this are nugatory and void; but, within it, binding upon all, whether right or wrong, politic or impolitic. No relief can be obtained if the charter is not transcended. Partial evil must be endured for the general good. The harmony of the system must be maintained. The judiciary, with all others, must submit to the commands of the legislature, so long as it revolves in its legitimate orbit, no matter what the consequences may be. The liability to abuse, is incident to all grants of power; and yet, if on this account, no power were delegated to agents, all government would be at an end, and the law-

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less rule of the strongest, would succeed to the harmony and order of regular government. The basis upon which the whole American fabric has been erected, is, that the people, being in possession of all power, have the right to partition it out as they think most conducive to their happiness, in the form of written constitutions, by which all invested with power shall be effectually controlled. This is the supreme and paramount law, before which all must bow with reverence. Over its barriers, even the legislature, with its mighty powers for good and evil, cannot pass. This limitation would be worse than useless, if there were no power in the State to decide upon their acts, and to bring them to the test, whenever any controversy arises on the subject. This delicate and important duty has been necessarily devolved upon the judiciary. How could it be otherwise? The judges are appointed and sworn to administer the law, and of necessity they must decide what the law is. In doing this, they are obliged to look first to the supreme law, to determine upon any conflict with it that may be alleged. This necessarily involves the right to declare an act of the legislature void, wherever such conflict is found clearly to exist. *Fletcher vs. Peck*, 8 Cranch, 87. But, where, in the best judgment of the Court, there is no collision, what then? Are the courts to look out some other standard; erect some ideal test, such as their own opinions of right and wrong, justice or injustice, or the general principles of a free government might suggest, and by that annul a solemn act of the law-making power? The absurdity to which such a doctrine leads, must, at once, condemn it, with all right-thinking men. There are, however, two standards to which we

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must refer, to try the validity of legislation—the constitution of the United States and that of our own State. The people have wisely parcelled out their power to two distinct governments; the one, general and national; the other, State and local. They both, in all their departments, operate upon the same people, and are concurrent and friendly, and not foreign or hostile to each other; both supreme and sovereign in the respective spheres assigned to them by the real and original sovereign power resting in the people, for whose benefit and happiness they were created, and by whose voice they are subject any time, to be changed or remodeled. The first, however, is more strictly limited in its action. It is confined to the powers expressly given and those fairly incidental thereto, such as are necessary to carry out and make effectual those expressly granted. The other (but I refer particularly to the legislative power of each) is only circumscribed by the limitations and interdicts of the two constitutions. The enquiry in the one case, is, where is the authority in the charter?—not, is it forbidden? And in the other, is it forbidden?—where is the prohibition? This is clearly indicated by the articles granting the power, in the two instruments:

“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Con. U. S., art. 1, § 1.

“The legislative authority of this State shall be vested in a general assembly, which shall consist of a Senate and House of Representatives, both dependent on the people.” Con. of Tenn., art. 2, § 3.

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Then, the only legislative powers of Congress are those specified in the instrument—"herein granted"—but no others; but those of the general assembly of the State, are general, extending to all powers of government properly denominated legislative; falling under that class of powers according to the accepted meaning of the words used; not that which is "herein granted," but the "legislative authority of the State"—all the law-making power.

But still, the past experience and sound forecast of the people were too great to leave this immense grant of power without limitations and restrictions. These are carefully and emphatically prescribed in both constitutions. A specimen of these may be found in the constitution of the United States, art. 10, § 1: "No State shall \* \* \* coin money, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility." And in the constitution of Tennessee, art. 1, many of them are set forth. In these and other clauses, we find guards and limitations upon legislative power in the fundamental law. These, as it must be presumed, were regarded as sufficient checks on the power granted, and no other can be added but by the same authority. Were it not for these restrictions the legislature of Tennessee would be as omnipotent as the parliament of Great Britain is assumed to be by the great commentator; and the same would, or might be the case, if there were no power in the State to hold it to its orbit and enforce the checks and balances of the constitution. And these, or worse consequences,

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might follow, if this restraining power, not so directly under the control of those upon whom all power acts, were allowed to be governed in their action by arbitrary rules established by itself, instead of the written constitution established by the people. The one would be as fluctuating as the opinions and prejudices of men, but the other is fixed and stable. In this, lies the great advantage of a written constitution—a settled, unbending supreme law.

Under the guidance of these general rules and fixed principles, we approach the question before us. Is the act of 1852 *forbidden* by any clause in the constitution of the United States, or that of the State of Tennessee, because of the reference made to the people?

The question of the constitutionality of a general act of the legislature, which is made in terms to depend for its vitality in every respect, as a condition, upon a vote of the people in its favor, has been very much agitated in the last few years, and in the courts of our sister States, conflicting decisions have been made upon it. That it is a question of difficult solution is fully evinced by the fact, that the first legal minds at the bench and the bar of the nation differ in their opinions.

The inherent difficulty of the question, as well as the great diversity of opinion upon it, and its high importance, all suggest the propriety of refraining from the expression of any opinion upon the abstract question until a case necessarily involving it, is presented and argued before us, which we do not consider these cases to do.

The writer of this opinion, however, would say for himself, that he is not able to see any thing in the con-

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stitution which would invalidate an act of the legislature on account of such a condition. It is easy to see many objections to it on the score of expediency; that it would be troublesome to the people; might be resorted to by the members for the purpose of avoiding responsibility to their constituents; protract the enactment of proper laws, and unnecessarily agitate the people. And on the other hand, it might save them from some hasty, crude and unacceptable legislation; yet that does not prove any thing upon the question of constitutionality; but these considerations would prevent this course being often, if ever adopted in legislation. It is difficult to see, when it is admitted as it is by every one, that the legislation of Congress or the general assembly may be, as it has often been, conditional; their acts made to depend upon conditions whether they are to go into effect or not; that in a republican government this particular condition, the sanction of the people, would be, by implication, against the constitution. It would seem that, in a popular government, if any condition could be tolerated under the constitution, it would be this; and that in making any great change in the policy of a State, it would not be incompatible with our institutions to suspend the same, until the sanction of those upon whom it was to operate should be obtained, to the distinct measure proposed, as well after it has been matured by the legislature by a vote of the people, as before by instructions. It is true, the power to make laws has been surrendered by the people, and vested in the legislature, so that no law can be made by, or emanate from them; but this does not prove that it would be an infringement of the constitution for their representatives

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to call for, and defer to their opinions, on the subject of a new law fully matured by them in all its parts, before it shall go into effect. But this question is left open, and no opinion given upon it by the court, as before stated, as we do not consider that this case requires it.

But, in the case under consideration, the court is of the unanimous opinion, and so decide, that the reference to the people of the question of subscription or no subscription of stock, does not invalidate the act by bringing it in conflict with the constitution.

This is a general law, perfect, finished and unconditional. It is not made to depend for its vitality upon the vote of the people, or any other future contingency. Whether Sumner, or any other county, act under it or not, it is still the law of the land, addressing itself to all the counties of the State, until repealed by the authority which gave it being. True, it will only operate in its vigor where and when the state of things provided for should transpire. But this is the case with all laws, criminal and civil. Every statute must apply to some future state of things, and their enforcement must depend upon the happening of the things contemplated—the action of others. The law against murder and larceny would remain dead upon the statute book, if no one would perpetrate the crimes against which they are directed.

But again, this act provides for the creation of a county debt for stock in a road, and a tax to meet it, and this is suspended on a vote of the people, and not the action of the court. The legislature, it is admitted, could do this, or it could empower the court or a corpo-



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ration to do it, but cannot leave it to the people! What says the constitution? "The general assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law." Art. 2, § 29. By another section, the "legislature is authorized to vest power over private and local affairs in the courts of justice." Art. 11, § 8. But here, in relation to the very delicate subject of taxation, the authority to impose taxes for county purposes, (and we have seen that this is such a purpose,) is to be communicated to the "counties," not to the courts, nor to the justices, nor to the officers. And how shall this power be exercised; by what agency or instrumentality? by the county courts or circuit courts, or by representatives from each civil district selected for that purpose, in convention, or by the people? No. The mode of doing it is left to the general assembly. The authority is to be exercised by the "*counties*" "*in such manner as shall be prescribed by law.*" The legislature, then, have, by the constitution, the unequivocal power to determine and direct how, and in what manner these taxes may be imposed by the counties upon themselves, as well as to what extent and for what purpose. That the county court may have been empowered to act for the county on this subject, is no objection to the different mode or agency adopted in the act. It may certainly be said with great safety, that as the legislature was expressly entrusted with the selection of the mode and manner of imposing the debt and the tax upon the county; it could not have adopted a plan more unexceptionable, than to refer the

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question directly to the tax-payers themselves. It was reasonable and just, the constitution permitting it, that it should be left to the people of the county to decide for themselves, in view of the burthens it would impose upon them, on the one hand, and the advantages on the other, whether they would go into it or not. The people might well consider that, although the debt proposed would be heavy, and the taxes onerous, for some years, yet their lands would be greatly enhanced in price, their facilities in trade and business, in transportation of their surplus produce, and intercourse with the rest of the world, would amply compensate them. The objection to this mode of deciding the matter, even if we were at liberty to decide upon grounds of expediency, which we have seen we are not, that the people are liable to be, and were in this instance, misled by parades, barbecues, and torch-light processions, got up by the friends of the measure, and backed by eloquent speeches by which the voters were gulled, deceived, and carried away, cannot be for a moment entertained. It is striking at the foundation of our institutions, and would annul all popular elections. It is a fundamental principle, in an elective popular government, that the people are capable of self-government, and may be safely trusted with their own interests. Besides, this was a matter among themselves and others, and others interested in their action cannot be affected by it; they cannot be allowed to take advantage of their own wrong in a contest with others. This is not a controversy between the affirmative and negative voters, but between a corporation and the whole county, bound by a vote of the majority. This is a government of majorities; it cannot be otherwise.

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Various other clauses of the constitution have been referred to in argument, but as we think they have no application, and are not seriously pressed; they need only be noticed very briefly. The clause which forbids private property to be taken for public use, (Art. 1, § 21,) has no application, because that rests upon the doctrine of eminent domain, and this upon the right and power of taxation.

They are entirely distinct, and in every respect dissimilar. The former is, when something beyond a mere equal share of the public burthens is taken from the citizen, and therefore he must be paid by that public to whose use it is applied; it is made a debt against the community of which he is a member. But this debt, as well as others which are contracted for the general good, can only be paid by taxation. The amount necessary for this, and all other public purposes, must be raised by exactions upon all in some form of taxation. In relation to this, the idea of refunding, or compensation, cannot be conceived. It would be simply and palpably absurd. Here no man's property is taken, but a tax imposed.

The clause against partial and private laws is also cited. Con. art. 11, § 7. This is, if possible, still more remote and inapplicable. To prove this, it will be only necessary to read it in connection with § 29 of art. 2. But these objections are but little relied upon, and need not be further noticed.

Secondly: It is contended that even if the act of assembly be constitutional in all respects, yet upon various grounds the proceeding in this case is void, because its provisions were not pursued, and the conditions pre-

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scribed to render the subscription obligatory upon the county have not been performed.

1. The various acts to be performed and orders made by the county court, under the provisions of the act, were done, and performed in this case by the quorum court, when only three justices were present. It is insisted that the act in the use of the words county court, in reference to the subject of taxation, must and did require a number to be present sufficient to levy taxes, or at least to appropriate county money. The argument goes further, and insists that wherever that court is simply designated by name, without more, in an act of assembly requiring duties to be performed or powers exercised, a number sufficient to transact *any* county business must be present. We cannot yield to the force of this objection. No power to levy a tax, appropriate money, or contract a debt, is conferred by this act. All this is referred to the people. The court has no discretionary, *quasi* legislative, or judicial power given to it in any part of this act. It is merely ministerial or instrumental, in every duty required of it. It is to receive and file the petition of the railroad directors or commissioners, to order and make regulations for elections, receive the return of the sheriff, and through their chairman subscribe the stock, and levy and have collected the railroad tax. No discretion is any where given, that seems to be studiously avoided by the legislature. The intention evidently was, to commit the whole matter to the people, and provide that their edict in relation to it, should be subjected to no intermediate obstructions, but be fairly and fully carried out by the use of the agencies designated. It cannot be doubted,

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but that it would have been as competent for the legislature to have appointed any other county officers to have performed these acts, as well as the justices of a county court. But these were thought most appropriate and suitable. Yet, the duties required were all ministerial. The court are to act under the mandate of the law in carrying out the will of the people, with no more discretion than a sheriff or any other ministerial officer, has in the execution of a writ or any other duty assigned to him by law. Then there can be no reason arising out of the nature of the duty to be performed which would require any particular number, provided there shall be as many as shall constitute a legal court.

The county court, as well as all other inferior courts, is the creature of the legislature.

The constitution provides, that the judicial power of this State shall be vested in one Supreme court, and in such inferior courts as the legislature from time to time may ordain and establish, and the judges thereof, and in justices of the peace. Art. 6, § 1. And by § 3, courts may be established to be held by justices of the peace.

The legislature of 1835, the first after the adoption of the present constitution, did establish a county court to be held by justices of the peace, and assigned to it its jurisdiction. That and subsequent acts prescribed the number of justices necessary for the exercise of certain specified functions. Three are required to constitute a court for ordinary business; without that number there can be no court; but to lay off roads, appropriate sums of money larger than fifty dollars, and some other things, require a greater number, and to levy taxes a still greater. In either, and in every case the tribunal is

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denominated a "county court." We take the correct rule to be, that in all cases where no particular number is specially required to constitute the court, that the duty may be performed by three. The legislature being the creator, can certainly shape the creature as it chooses. Then, when a new power is given to, or duty required of the "county court," and no particular number of justices are specified, any number which may constitute a legal court can perform it. This conclusion is strengthened by the fact that in cases where more was required, it so provided in the acts. Here then, was a new duty required of that tribunal without any designation of the number, which should compose it; consequently, if the acts were done by the county court, whether composed at the time of three, or fifty members, the law is complied with, and the action is valid, and binding upon all concerned.

2. The vote of the people was taken before the location of the road. The act makes no such prerequisite. True, it says, the question of taking stock in "any road which passes through or contiguous to any county" may be put to the people. But it also provides that the commissioners for any road may apply to the court to take the vote, and it shall be ordered. Now, this must be previous to the location, because the organization of the company has not taken place by the election of directors and officers. Such could not have been the intention of the law, because the particular location of a road often depends upon the prospect of the aid to be obtained at different points from individuals or corporations. But again, if this were an objection, it was obviated by a condition in the order for the election,

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requiring the road to pass through the county and make Gallatin a point. And this was ordered by the board of directors, and officially communicated before the subscription was made.

3. The condition in the order by which Gallatin was made a point, was a fraud upon the stockholders, as it was out of the direct route, and operated as a bribe upon that portion of the voters. The stockholders were represented by the directors who accepted the terms upon a full knowledge of the facts, and the party who proposed the terms cannot be heard to object to them. So far as these objections relate to the influence of this condition upon the voters in the vicinity of Gallatin, it can have no effect, as the same objection would apply to the condition requiring the road to pass through the county, as that had an influence on all the voters. But there was no concealment or mistake of the facts upon this point, as the conditions were all published and canvassed before the people.

4. The stock is made payable in five instalments in the order, and the act contemplates but three. This objection would seem to be made under a mistake as to the provisions of the act. In the 8th section, it is provided that not more than one-third of the stock voted and subscribed shall be required in any one year. It no where prohibits more instalments and a less amount. This is more favorable to the tax-payers, and cannot be an available objection. If it were a departure from the act, it would not lie in the mouth of the party benefited by it to complain, and more particularly when it was fixed by the vote of that party as a term of the contract.

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5. The election was carried by fraud, bribery, &c. These grave charges are not proved, and cannot be presumed to be true. The stump speakers may have colored too highly the advantages of the road, misrepresented the law, and made promises which could not be fulfilled. But if this were so, it was a case of the voters acting upon themselves; the relator is not implicated; the rights of the company cannot be affected by it. If objections of this kind could prevail against a popular decision, what election could stand? Would not the government be without officers?

6. The order of the court upon which the people voted, was not single and positive, but in the alternative, as to two roads; that is, it proposed that \$300,000 should be subscribed in the Nashville and Louisville road, provided the board of directors located it permanently through Sumner, and made Gallatin a point, on or before the 1st of September, 1852; and if not, then to be subscribed in the Nashville and Cincinnati road. By this, it is insisted, the friends of both roads were brought together, when perhaps neither, alone, could have secured a majority.

Here, again, the argument is at fault, because if this were calculated to unite the friends of both, it would at the same time bring the enemies of each together, and drive off many who might vote for one because it would pass near them, and because of this uncertainty, array themselves against the entire proposition. But, independent of this consideration, we can see nothing in this to invalidate the proceedings. The great object was to have a railroad traversing their county, and there



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was nothing improper in presenting to them two chances for it—a first and second choice.

There are many other ingenious objections taken to this proceeding under the act of 1852, and pressed upon us with much force and cogency of reasoning, which it would be a useless consumption of time to notice in detail, as we have given to them severally and collectively the most mature consideration of which we are capable, and consider them unavailing, and insufficient to resist this application.

Thirdly. But it is further insisted that if the act of 1852 be not repugnant to the constitution, and the proceedings under it subject to no fatal objection, yet the changes made by the amendatory act of 1853, under which this demand is made, are such as to annul the subscription and render the whole proceeding void. Let us examine it. This act refers to the proceedings under the former act, ratifies and confirms them, declares the subscription of the stock valid and binding upon the county, but provides a different mode of paying for the stock; that is, by the issuance of the county bonds payable at not less than ten, or more than twenty years, at an interest of six per cent., to be signed by the chairman, provided a majority of the people vote for the change, and the board of directors for the road will agree to it, by receiving them in payment. The question was submitted to the voters and carried in favor of the bonds, and the company agreed to receive them.

It is unnecessary to look to the effect of an affirmatory act upon a proceeding or contract which was void at the time it occurred, as we have already shown that this is not such a case.

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In what light is this transaction to be considered? Is it not a contract? A proposition was made by the railroad company, to the people of Sumner county, through their county court, as an instrument, to subscribe for a certain amount of stock to build that part of the road which passed through their borders; they accepted the proposition, and the contract was closed by the subscription. All this was done, as we have said, in substantial conformity to the law, so as to bind both parties. The contract is closed. The county is bound for the money, and the corporation for the stock. Afterwards, by this act, the legislature, under whose authority the contract was made, empower the parties to change it, if they choose, in relation to the time and mode of payment, and some other particulars. The same parties who made the contract—the people on the one side, and the board of directors for the road upon the other—agree to it. Whose rights are affected; what rule of law forbids it? The parties to any contract may surely change, impair, or even destroy it, by mutual consent. The legislature cannot act retrospectively upon a contract so as to impair its obligation or affect vested rights, but the parties to it may, when no other rights but their own have arisen under it.

How far the power of the legislature would extend to change and modify the terms upon which the stock was taken, by the vote of the people, without the consent of the parties, need not be investigated, as that is not attempted here. This state of the case would produce the necessity of examining those clauses of the constitution which forbid the enactment of retrospective laws, and preserves the obligation of contracts and the

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sanctity of vested rights. Upon the assumption of this hypothesis, many of the objections taken are argued, and made to rest; and to this they are indebted for their apparent pertinency and force. They are also predicated upon the unfounded assumption that the county court, and not the people of the county, is the contracting party on the one side. And here, several points in the argument may be briefly noticed, which might perhaps have been more appropriately considered before.

1. Counties are not corporations, but civil and political divisions of the State. For some purposes they are merely civil divisions, but for others, they certainly are corporations. They are therefore, sometimes called *quasi* corporations. They are political, aggregate corporations, capable of exercising such powers as they may be vested with by legislature. Ang. & Ames, 17, 24. 9 Wheaton, 907. 1 Baldwin, 222. Any body of persons capable of acting as one man, and in a single name fixed by law, having succession, is, in some sense, a corporation. Without going into all the ramifications of this subject, to be found in the books, it is sufficient to say, that the counties in our State are clothed with the powers and attributes of corporations to a sufficient extent to be able to act and contract; to become debtor and creditor, so as to subject all the persons and property within their limits to taxation in any mode that may be prescribed by the legislature. And whether this be by the action of the county court, or a vote of the people, or any other agency, can make no difference. The legislative power is not restricted, or confined, in this particular, except as to purpose, not as to mode. The only inquiry upon this point, is, what saith the law?

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2. If the county should take the stock as a corporation, it must own it as such, and cannot distribute it among the people, and in the proportions they may pay the tax. Why not? Certainly nothing could be more just. It is a debt against all, and for which all are bound as an aggregate mass; but as the debt is discharged, the thing for which it was contracted is distributed to each in proportion to what he may pay. He who pays most money is to own most stock. No provision could be more just and equitable. It would, in some respects, operate unjustly to retain the stock, when paid for as a county fund, to very many who had borne the burthen of it. The population of a county is constantly fluctuating. One man who had paid a part of the tax removes, and another who paid none of it, comes into the county; in which case, the one who had contributed nothing would have all the advantages of the fund, which might relieve him from county taxes, as well as the road which was built by it; and the other, who had paid and toiled for the benefit, would be entirely deprived of it. The distribution of the stock avoids this injustice, as it becomes property and goes with the owner. If there were no other reason, this would be sufficient to sustain the propriety of this provision of the statute. And as to the discretionary power of the legislature to order it the one way or the other, there can be no question.

But it is said, it cannot be a county purpose as required by the constitution, unless the stock belongs to the county as a corporation. It is not the stock as an investment, to which reference is made in this clause, but the road in which the stock is held. If this were

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not so, the people might be taxed to raise a fund to take stock in a steamboat or factory, or California mining company, provided the authorities should allow it to be done. But the constitution protects people from taxation for speculating enterprises; it can only be done for some local improvement or benefit; the thing to be done with the taxes raised, must, in itself, be a "county purpose." The compensation to the payer of the taxes may be in the local benefits alone, to him and his neighbors, or to this may be added stock in the improvement, to the extent of his contribution, as in this case.

3. But it is here objected, that the result of this proceeding, disguise it as you may, is to make a citizen take stock, whether he will or not; and that is oppression. That is to say, if we understand the argument, that although it might be lawful to tax the citizen to build a road, if that is the end of it, yet, if you make him the owner of stock in it to the extent of his contribution in taxes, and return to him any part of the outlay in tolls or profits, it becomes unlawful and oppressive. It is very true that no man can be forced to enter into a contract for stock in a road, or for any other purpose, without his consent; it is of the essence of a binding contract that the party freely assented to it. But this is not a contract with the individual citizen, but with the community, the aggregate corporation, or body politic, of which he is a member, and by the legally expressed will, and lawful engagements of which he is bound. The consent of such bodies is to be given in such manner as may be prescribed by law. Here it was to be done by

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the community to be bound, itself, and to be ascertained by the vote of a majority. A majority gave this consent, and entered into the engagement. Shall not the minority be bound by it, and incur equal responsibilities, as well as participate equally in any advantages that may result? Can the minority complain of oppression by the majority, when the latter take the same burthens upon themselves? It is the very first principle of all republican governments, and every free society or organization of men, that majorities must rule and control. Kyd, 422. Angel & Ames, 396-7. 7 Serg. & Rawle, 517. This principle is only limited by positive regulations. *Id.* Has it ever been thought that any contract or lawful imposition of taxes, or other burthens, could be repudiated by the minority because it did not meet their approbation? In every community or society consisting of many, there must be some mode of concentrating the power of action into a single will or purpose. In a despotism, this is in one individual; in an aristocracy, in a few; and in a democracy, or republic, in all. But in each and all, the result is the same; one purpose in action to which all must submit, or there is an end to all government and order. Happily, under our institutions, the principle is held sacred that none are bound, unless a majority agree to it, but then all, every individual equally, whether he approve of the decision or not. Perhaps there never was a tax laid by the legislature, either State or national, by the county court, or even by the people, where the power to do so is by law vested in them, which met the approbation of every tax-payer.

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A very honest difference of opinion may exist as to the tax, or the object to be accomplished by it; and to produce action, some mode of settling the question must be resorted to. In this case, it was made to depend upon the result of a popular election; the voice of the majority has been heard, and must be obeyed by all. If the decision be wrong, or the burthen great, it is better to endure it than to abandon a sacred principle which underlays all our institutions. By an abandonment of this, if it were in our power to do so, the partial evils of a temporary wrong would be but as the weight of a feather to those which would follow. If the first principles of our system are abandoned, the whole fabric must fall to the ground, "and great would be that fall."

The Davidson county case presents some different questions. The act under which it proceeded, was different from the other in a few particulars. It was passed at the same session, (act of 1852, ch. 191, § 12 to 20,) and only applied to a few counties, including Davidson. We will only notice a few of the points made in this case, and none which are the same in both cases.

1. The other act required a majority of the "votes polled" to be for the tax, but this is in these words: "*Provided*, that neither of the said county courts shall so take stock, until the question of the taking of the same shall first have been submitted to the voters of the county, which it is proposed shall subscribe stock, and a majority of such voters shall have decided in favor of taking the stock proposed." Again, in § 14. "that whenever the majority of the voters of either of

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the above named counties, shall decide in favor of the proposition that the county shall take stock as proposed, it shall be the duty of the county court," &c. The question made is, whether this act requires a majority of all the legal voters residing in the county at the time of the election, or only a majority of those who may attend the polls and actually vote. We are referred to the latest State and county elections, to show the number of voters in the county, and then to the vote on this question to prove that the number of affirmative voters falls very far short of a majority of the legal voters in the county, 'though they exceed, by several hundred, the negative votes. How can we know how many legal voters there are in a county at any given time? We cannot judicially know it. If it were proved that the vote was much larger in the last preceding political election, or by the last census, by the official returns, or the examination of the witnesses, it would only be a circumstance, certainly not conclusive, that such was the case at the time of this election. But we put our decision of that question upon a more fixed and stable ground. When a question or an election is put to the people, and is made to depend on the vote of a majority, there can be no other test of the number entitled to vote but the ballot box. If, in fact, there be some, or many who do not attend and exercise the privilege of voting, it must be presumed that they concur with the majority who do attend, if indeed they can be known at all to have an existence. Certainly it would be competent for the legislature to prescribe a different rule. But when they simply refer a question to the decision of a majority of the "voters



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of a county," it cannot be understood that they mean anything more than those who see fit to exercise the privilege. Great inconvenience would result from the opposite rule. Suppose the vote should be very close, one, two, or a dozen majority, one way or the other, how could the fact be ascertained but by the box of the exact number entitled to vote? It cannot be presumed that this, or any other question submitted to the people, was intended to be involved in such embarrassment. Whenever it is so intended by the law, it will be expressed, and some convenient mode prescribed to settle any controversy that may arise. They might say, to be sure, that a number equal to a majority of those who voted, at the last election for Governor, or for electors for President, or prescribe any other arbitrary test. Though this might not be the true test of the number then in the county, yet it would be a sufficient approximation to certainty to answer the purpose. This, or any other prescribed test, would be binding, though arbitrary, and of doubtful expediency. But as none such, or any is given by the legislature, we take it for granted, and so construe their language, that it was only intended to look to the ballot-box for the "voters of the county," and from that allow no appeal. Angel & Ames, 398-9.

2. The respondents say there was at least one civil district in the county in which there was no election held, and the polls not opened. This, it is contended, renders the election void, according to the decision of this court, in *Marshall vs. Kerns*, 2 Swan, 68. We do not understand the principle settled in that case to go

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so far. It is an old, familiar rule, that cases are only authority to the extent of point in judgment—the question raised by the facts before the court. The record in that case showed that two men were candidates for the office of circuit court clerk of Campbell; that the majority was three votes only, and that at one precinct there were at least twenty voters present desiring to vote, and the polls not being open, they were deprived of the privilege. Under that state of facts, the election was declared void, because it was impossible to know whether the successful candidate would have been elected upon a full expression of choice by all who desired and were entitled to a voice in the election. It appeared that voters enough were deprived of the right, and that against their will, to have changed the result. But suppose the majority had been twenty-one, and only twenty attended the unopened ballot-box; or that all who attended there had in fact gone to another, where they did, or might have exercised their franchise; or it did not appear that any one attended, or if any, not enough to have changed the result, if all had voted one way, could it be successfully insisted that the principle of that case authoritatively applied, and would annul such an election? Certainly not. Such an effect we think could only be produced by express statutory provision. The ground of that decision was, that the facts which appeared in the record, showed that but for this fault of the sheriff, the result *might* have been different. What would be the effect in a case where a sufficient number attended to change the result, and might have gone from that to another district in time

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to vote, if they desired to do so, but did not, we need not now say, as the case of *Marshall vs. Kerns* does not present that state of facts, nor does this.

It may not be out of place here to remark, as the subject seems to be so often and by so many misunderstood, that the generality of the language used in an opinion is always to be restricted to the case before the court, and it is only authority to that extent. The reasoning, illustrations, or references contained in the opinion of a court, are not authority, not precedent, but only the points in judgment arising in the particular case before the court. The reason of this is manifest. The members of a court may often agree in a decision—the final result in a case—but differ widely as to the reasons and principles conducting their minds to the same conclusion. It is then the conclusion only, and not the process by which it is reached, which is the opinion of the court, and authority in other cases. The law is thus far settled, but no farther. The reasoning adopted, the analogies and illustration presented, in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur, or they may not. So of the principle concurred in and laid down as governing the point in judgment, so far as it goes or seems to go beyond the case under consideration. If this were not so, the writer of an opinion would be under the necessity in each case, though his mind is concentrated upon the case in hand and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations, and qualifications which

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every variety of facts and change of phase in cases might render necessary.

The case now before us, to which it is insisted we should apply the principle of *Marshall vs. Kerns*, is thus stated in the answer; and it is a rule of pleading, that if the facts as stated by a party cannot avail him, it is to be presumed that none sufficient exist, and the legal result must follow. "*And in at least one precinct no election whatever was opened and held.*" This is all that is set forth, no other fact is stated. If that be admitted by the demurrer to be true, it cannot have the effect claimed, because if there were no other reason, it does not follow from that alone that the general result of the contest was affected by it. The burthen of showing this lies upon those who contest the general return of the sheriff, which must stand and be regarded as sufficient evidence of the result of the election, until the contrary is clearly made out by the contestants. Then there is nothing in this objection fatal to the proceeding.

It is also urged, that the county court set two other days for the election, previous to the one on which it was held, and disappointed the same by countermanding orders, for fraudulent purposes, and by which the people were confused and deceived. If this was an irregularity, it was not sufficient to invalidate the final election, which was in fact the only one actually held. It is, however, difficult to perceive how this could have had the effect attributed to it. It gave more time for consideration and debate, and more general notice to the people. The agitation produced by these failures and disappointments, and the increasing excitement on both sides, was surely

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calculated to elicit all the arguments as well *against* as *for* the proposition, and bring out a fuller expression of the popular voice. But if this were not so, yet it was the action of the contestants, that is, the county court, in which every justice of the county might have been present; and they cannot be permitted to object to their own proceedings, their own wrong, if it were wrong. The election was carried, it is said, by illegal votes. That was a case for contest, and cannot be taken advantage of in this mode.

There are other grounds of defense suggested by the ingenuity of the learned and able counsel, both in the answer and briefs, which would receive, and are entitled to our notice and observation, if it were not that this opinion has already been so much and perhaps unnecessarily protracted. They have all been considered, and according to the best judgment we have been able to form, present no sufficient answer to the petition for the writ of *mandamus*.

The judgment of his honor, the Circuit Judge, is therefore, affirmed in both cases.

The bill filed by Sims and others, to enjoin the collection of the taxes levied by the county court of White, under a proceeding in that county by virtue of the same act under which the county of Sumner acted, will be dismissed, as was decreed by his honor, the Chancellor.

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Cook & Steadman vs. The Sumner Spinning and Manufacturing Co.

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COOK & STEADMAN vs. THE SUMNER SPINNING AND MANUFACTURING COMPANY.

1. CORPORATION. *Power of a municipal corporation to take stock in a manufacturing company.* A corporation is the creature of the law, possessing no power or authority except such as is expressly granted by the charter of incorporation, or as is necessarily implied. So the power to levy and collect taxes in the charter of a municipal corporation, does not authorize the purchase by said corporation, of stock in a manufacturing company, or the issuance of bonds for the payment thereof, and bonds issued for such purpose under said charter are utterly void.
2. IGNORANCE OF LAW. *Application of the principle.* The maxim that ignorance of the law is no excuse for the breach or non-performance of any agreement, only applies to the general or public laws of the land, which affect and prescribe a universal rule of action for the whole community; and has no application to special or private acts of the legislature, which are designed only to operate upon particular persons, or to regulate private concerns.

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FROM SUMNER.

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This was a bill filed in chancery at Gallatin. The complainants, Cook & Steadman, contracted with the defendants to build their factory near the town of Gallatin, and to furnish and put up the machinery therefor. In part payment therefor, the complainants agreed to take \$5,000 in corporation bonds of the town of Gallatin, at ten per cent discount. The corporation became a stockholder in the manufacturing company to the amount of \$4,500, and issued their bonds for the payment thereof for \$5,000, payable ten years from date, with interest at six per cent, payable annually. The complainants filed this bill to be relieved from accepting the bonds, and for other purposes not necessary to be stated. The ground assumed in the bill, is,

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that the bonds were void and worthless, for the reason that the corporation were not legally authorized to issue them. The answer insists that the bonds are valid and binding upon the corporation. Other issues are presented in the record, which it is not necessary to state. Chancellor RIDLEY decreed upon this point in favor of the respondents, from which the complainants appealed.

JORDAN STOKES, for the complainants, said:

1. The corporation of Gallatin had no power under its charter, to bind itself by a subscription of five thousand dollars of stock, to aid in the construction of the Sumner mills; and that, as a consequence of this want of power, the bonds of the corporation, issued to pay this subscription, are null and void; not binding on the corporate body, or the individual members thereof, although they may have assented to the exercise of the power in this instance. Municipal corporations are the creatures, the handiwork of the legislative power; which creative power belongs, as matter of inherent right and of necessity, to all such sovereignties as the States of this Union. *Hope vs. Deaderick*, 8 Humph. Rep., 1. *Nichol vs. Corporation of Nashville*, 9 Humph. Rep., 263. Their powers, and the mode of exercising them, when created by statute, depend alone upon the true construction of the act of incorporation, having no other powers than those expressly given, and such as are incidental to their very existence. 9 Humph. Rep., 261-2. 13 Peters' S. C. Rep., 587. 6 Cond. Rep., U. S., 444. And all their acts or contracts are utterly null and void, unless embraced within the powers thus dele-

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gated. 13 Peters' Rep., 587. 9 Humph. Rep., 262-3. *Union Bank vs. Jacob*, 6 Humph. Rep., 520.

2. The act, incorporating the town of Gallatin, does not confer, in express terms, the power to subscribe stock to aid in building up manufacturing establishments; it delegates just such powers as are usually given to such corporate bodies, looking only to the good government of the town, the improvement of the streets and alleys, and the preservation of the health and morals of its citizens. See charter. 2 Scott's Revisal, 375. The power to hold real and personal property, given by the first section, and the power to "levy and collect taxes," given by the second section, were relied upon in the court below as conferring the power expressly; but we presume that this position will not be seriously pressed in this court. These powers point to no object or purpose for which property can be held, or taxes levied and collected; each one of them is referable to, and limited and controlled by, the other powers, which define the purposes and objects of the corporation. These powers are incidental to all municipal corporations, which they possess as fully without being mentioned in the charter, as by being embraced in it.

3. The power of embarking the corporation of Gallatin in an enterprize of the character under investigation, is not a power incidental to its corporate existence, nor is it a means, necessary and proper, to carry into effect any power expressly conferred, or duty expressly imposed on the corporate body under its charter. It could not have been intended by the legislature to confer such power, either in terms or by implication, for the act of incorporation was passed on



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the 17th November, 1817, when the idea of manufacturing cotton and woollen goods, in an establishment like the Sumner mills, had not attracted the attention of individual enterprize in this State.

4. It is well settled, however, that to enable a municipal corporation to subscribe stock and issue its bonds for such a purpose as the construction of railroads and turnpikes, and the same reasoning will equally apply to the erection of manufacturing establishments, the power to do so must be delegated in express and unequivocal terms. It cannot be resorted to by implication. It cannot be used as a means to carry out some other power. It can only be used when expressly delegated.

5. So far, the argument has proceeded on the assumption that the legislature could delegate to a municipal corporation the power in question; but we deny that the legislature of this State has any such power, under the old or new constitution; and we hold that, if the legislature had conferred upon the corporation of Gallatin the right or authority to subscribe stock and issue bonds in aid of the Sumner mills, it would be an unconstitutional exercise of power. The grant of the power in question to, and its exercise by a municipal corporation, implies necessarily, the right to levy and collect a tax for the payment of the stock, or the bonds, if bonds are issued in extinguishment of the subscription. It is a well settled principle in all free governments, that the legislative power cannot take by taxation, or otherwise, the private property of the citizen, except for some public use. This principle is as well known to the parliament of England, under magna charta, as to the legislature of this State, under

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the constitution and bill of rights. Bill of Rights, § 21. *Hardin vs. Goodlett*, 3 Yer. Rep., 41. *Clark vs. White*, 2 Swan's Rep., 548. Story on Con., § 1790. 2 Kent's Com., 392, 7th ed. 1 Black. Com., 139. 2 Dev. & Bat. L. Rep., 455. And it will follow, as a necessary consequence, that the legislature of this State could not, either under the old constitution, or under the 29th sec., art. 2, of the new constitution, delegate to a municipal corporation the power to levy and collect a tax for any other but a public use; or, in the words of the constitution, for a "corporation purpose."

Now, the Sumner spinning and manufacturing company is a private corporation; the use, purpose, and object of its establishment, are solely the private gain and emolument of its owners; its entire property, with its profits or losses, is governed and controlled by the law, applicable to private property; its stockholders have the right, to the exclusion of all other persons, to the possession and enjoyment of the establishment, to the same extent that any one has to his dwelling-house or farm; the public has no right of enjoyment, use, or easement in the establishment, or its profits, in any event. It is, therefore, peculiarly a private enterprize, in no sense belonging to that class of public enterprizes embraced by the expression "public use or corporation purpose;" and it is no such purpose, for the promotion of which a municipal corporation could be empowered to levy and collect a tax. *Sharpus et als. vs. Mayor of Philadelphia*. *Boston Water Power Co. vs. City of Boston*, 9 Met. Rep., 199. Ang. & Ames on Corp., § 449-50. *Hardin vs. Goodlett*, 3 Yer. Rep., 41. *Swan vs. Williams*, 2 Michigan Rep., 427.

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If we are correct in the foregoing positions, it is clear that the corporation of Gallatin had no power to subscribe the five thousand dollars of stock, and that the bonds, issued in payment of the stock, are not binding on the corporate body, but are utterly void, and of no effect. This being so, it will not be insisted that Cook & Steadman are bound to take them. To force them to take the bonds, under such circumstances, would be such gross injustice, such unconscionable advantage and iniquitous over-reaching, that the just and liberal principles of a court of equity would not tolerate the injustice for one moment.

SOLOMON, for the complainants, said:

1. In every bond there must be an obligor, and a sum upon which the obligor is bound. An instrument upon which no one is bound is no bond. An instrument issued by the agents of a corporation without authority, or where they have exceeded the powers granted in their law of incorporation, is not binding upon the corporation, and therefore no bond. A corporation is bound by the acts of its officers or agents, only so far as these acts are authorized by the charter of the corporation. 2 Iredel, 338. If the bonds tendered be not binding on the corporation, complainants are not bound to take them.

2. The corporation is not bound upon the bonds tendered with the record. The subscription of the stock is unauthorized by the charter of incorporation, and the bonds issued in payment thereof is a mere nullity. No tax could be levied for their payment. See charter of

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incorporation, Scott's Revisal, 378, vol. 2. 6 Humph., 515. *Nichol vs. Nashville*, 9 Humph. This latter case differs from this one in this. The purposes of the subscription are different; and there was a special act of the legislature authorizing that subscription. Under these decisions, I contend that the corporation of Gallatin is a public corporation; that it is created by the legislature for certain purposes, and clothed with powers alone necessary to carry out those purposes; that it cannot exceed those powers, and when they do the act is void.

3. The issuance of the bonds in payment of subscription is not a corporate purpose within the meaning and spirit of the act of incorporation. No such power can be directly gathered from the act; and under the decisions of this Court the incidental powers belonging to a corporation are only extended to necessary consequential means to carry out the objects of incorporation. 6 Humph., 515.

4. The objects of the incorporation of Gallatin is for social and civil purposes. The subscription of stock in a manufacturing company, is, in no way, connected with either of these purposes, and is not a necessary measure to carry out those objects. The establishment is situated outside of the corporate limits. It is not under the control of the officers of the corporation, but the president and directors. The factory would have been built without the subscription. The contracts and the building had been in operation some time before the subscription was made. All benefits conferred are of a private nature. It does not conduce to the morals, nor does it add to the municipal government of the town,

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nor has it ever declared any dividend. The proof is, that it was not to the interest of individuals to subscribe. How could it have been for a corporation purpose, and that too, to give \$5,000 for \$4,500 stock. The benefits conferred are simply such as any establishment or trade will confer, but are not benefits to the corporation.

5. A corporation has no power to vest means in real estate, or other property, except it be used for corporate purposes. 3 Peck, 232. A corporation cannot be seized of lands in trust foreign to its charter. 8 Johns., 422.

6. The subscription of stock not being a necessary measure in the carrying out the purposes of incorporation, no tax could be levied to pay the subscription. 11 Humph., 1.

7. The ordinance authorizing a vote to be taken by the citizens of Gallatin, nor the vote itself, can legalize the bonds, and make them binding. A public corporation is entirely under the control of the legislature, and can only be bound by its authorized officers. 5 Humph., 288.

WINCHESTER, for the complainants, said :

Has the corporation of Gallatin the authority, under its charter, to subscribe stock in a joint stock company, and issue bonds in payment therefor; and if so, upon the facts of this cause, can C. & S. be compelled to receive them? We deny that any such authority is conferred by its charter of incorporation, upon the town of Gallatin, as is contended for by the defendants. See Scott's Revisal, —, where, after a specific enumeration of

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powers usually conferred upon a municipal corporation, the general power is given to lay and collect taxes, from which, by some extraordinary powers of implication, the power to subscribe stock in a joint stock company, is deduced. Judge Turley, in the case of *Nichol vs. The Mayor and Aldermen of Nashville*, says: "A corporation is the creature of the legislative department of the government; it exists solely and alone by virtue of its act of incorporation, and it can exercise no powers but such as are expressly granted to it, and such as are the result of necessary and proper implication." It is not contended, of course, that this power is expressly granted. We ask if it is the result of necessary and proper implication? Did the idea of a manufacturing speculation ever enter the brain of the framers of this law, or did they simply mean to carry out any of the enumerated powers, or any other direct corporate purpose—to follow the distinction of a learned judge—you may levy and collect taxes? To imply this power under the general clause alluded to, would be to go further than was done in the case of *Nichol*; for there was a special act authorizing the subscription, and the hypothecation of taxes or the issuance of bonds in payment thereof. Here it is implied from a general grant of power "to levy and collect taxes;" from which, Judge Turley says in that case, it is not contended the power arises. But we submit, may it please the Court, that to levy a tax, and to create a debt and execute bonds in payment therefor, are two very different things, both in their present effects and future consequences; and that while the general power to levy taxes may authorize the raising of funds *ad libitum*, and the estab-

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lishment of free banks, if you please, in every town in the State, inasmuch as delegated powers must be strictly construed, it can hardly authorize the creation and rendering of a debt for purposes of this sort. If this power exist, the only remaining question is, can the establishment of a manufactory like this be regarded as a corporate purpose of a municipal town? We think it cannot. It certainly does not meet the idea of a direct corporate purpose, as defined by Judge Turley in the Nichol case. See 9 Humph., 269; and certainly falls short of the idea of an indirect corporate purpose, as defined in the same cause. It is not situated within the corporate limits of the town; nor is the benefit resulting to the town more direct than to the balance of the surrounding country. Unlike the railroad, it is not a constantly increasing source of wealth and prosperity, opening up new avenues of trade, with the construction of new roads and new connexions; opening up new markets, and awakening competition in trades; but its influence upon the trade and commerce of the town has reached its acme, and its future benefits are the dividends of its stockholders.

But if the bonds be good and valid can C. & S. be compelled to receive them? We think not. They are utterly worthless; cannot be negotiated in the markets; and it would be unjust and unconscionable to compel them to receive them in part payment of contracts which the proof shows to be worth every dollar stipulated to be paid.

GUILD, for the respondents, with whom was JOHN J. WHITE, who said:

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The principal question here is in regard to the *power* of the corporation of Gallatin, under their charter, to subscribe for the stock, and issue their bonds for its payment. The view taken of it in the answer to the amended bill, which is sustained by the proof in the cause, is, that the erection of the factory is of great advantage to the citizens of the town; increasing its trade and population; adding some 70 or 80 persons to the laboring hands of the town; increasing the demand for breadstuffs, goods, &c.; and by its mills operating at all seasons by steam-power, furnishing meal and flour to the citizens when they could not elsewhere be procured; affording employment to many poor families, and, indeed, advancing every interest of its citizens, and injuring none. That the taking of a reasonable amount of stock in this factory by the corporation, with a view to aid in its erection, is strictly for corporation purposes, and sustained by the case of *Nichol et als. vs. Mayor and Aldermen of Nashville*, 9 Humph., 268, we think there is no doubt.

The town of Gallatin was first incorporated in 1815, (see 2 Scott, 279,) with similar powers to the town of Franklin. See act incorporating this town, 2 Scott, 227. By that act, the power of taxation seems to be given merely for the purpose of carrying into effect *certain specific purposes*, which had been before enumerated.

But, in 1817, there is another act of incorporation of the town, defining their powers, (2 Scott, 375,) in which we find a general power "to lay and collect taxes," entirely unlimited as it regards either the object or amount, and only restrained by the *proviso* that it is not exercised in a way incompatible with the constitu-



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tion and laws of the State. Or, as we find it in the 29th section of the 2nd art. of the amended constitution, that "the general assembly shall have the power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law." It is true, the amended constitution was passed subsequent to the act of incorporation. But, then, it is recognized as a correct principle, both in the case of *Hope vs. Deadrick*, 8 Humph., 1, and the case of *Nichol vs. Mayor and Aldermen of Nashville*, 9 Humph., 266, that the legislature had the same power before. And, at all events, it could have no other influence upon the before-granted power of taxation, than to restrain its exercise to corporation purposes; that is, for the benefit of the town.

It has already been said, that taking this stock in the factory was a corporation purpose. If so, the corporation would have the right to use their money in its payment; or, if it was more for their interest, to give their bonds. In that event, they have the power of "laying taxes," both for the payment of the interest upon the bonds, and the bonds themselves. And it follows, as a necessary result, they would have the power to issue the bonds, if they could provide for their payment.

The legislature has the power, both under the constitution, and independent of the constitution, of delegating to a corporate town the power of laying taxes for corporation purposes. If it has given to it an unlimited power "to lay and collect taxes," would the power be strengthened, or enlarged, by adding that it

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may "lay and collect taxes *for corporation purposes?*" We submit that it would not. This would be implied, and would only go to limit the general and uncontrolled power which has been given. It was not necessary to be added, to make the grant of power complete. If that part of the clause had been added, no one would question the power. Is it not as efficacious without it, as that expression would only limit the general power? We apprehend that it is.

In addition to this, the charter gives the power to "purchase and hold real, mixed and personal property, or dispose of the same for the benefit of the town;" which would include an authority to purchase and hold stock in this factory for the benefit of the town, and consequently to pay for the same, either directly in money, or by the issuance of their bonds.

McKINNEY, J., delivered the opinion of the court.

In January, 1847, a charter of incorporation was granted to "The Sumner Spinning and Manufacturing Company," for the period of ninety-nine years, for the purpose of manufacturing cotton and woollen goods or either;" with a capital stock of not less than thirty thousand dollars, but, which might be increased at the option of the stockholders, to one hundred thousand.

On the 11th of July, 1851, the complainants entered into a written contract with the president and directors of said company, by which the former undertook to furnish, deliver, and put up for said company, at their factory building near Gallatin, a large quantity of machinery and fixtures of various kinds, for the manu-

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facture of woollen and cotton goods, and also for corn and flouring mills, a particular description of the quantity and quality of all which is contained in the written instrument, but need not for the purpose of this decision be here noticed. And, in consideration of this understanding, the president and directors, on behalf of the company, agreed to pay Cook & Steadman the sum of thirty-nine thousand five hundred dollars, one-half to be paid in cash, upon delivery to the company of the bills of lading of said machinery, and the policies of insurance upon the same properly endorsed to said company. The other half in six months from that date, with interest thereon. The following is the stipulation in respect to the mode of payment of the latter half. "The said Cook & Steadman agree to take one thousand dollars in the stock of said company, as payment to that extent; and they further agree to receive of said company, the *bonds of the Corporation of Gallatin, for five thousand dollars, at ninety cents in the dollar, if the company shall wish to make such payment*, the balance to be paid in cash." The foregoing is the substance of so much of the agreement as is necessary to be stated.

The proof shows, that at a regular meeting of the Mayor and Aldermen of the town of Gallatin, held on the 1st of November, 1851, an ordinance was passed, the first section of which provides, "that the Mayor of said town shall, and he is hereby authorized and directed to subscribe for four thousand five hundred dollars of the capital stock in the Sumner Spinning and Manufacturing Company, upon the books of said company, in the name and for the use of said corporation."

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The second section provides, "that to pay for said stock, the Mayor of the corporation is hereby directed to issue to said company, or to such person or persons as they may direct, the *bonds* of said corporation, under the seal thereof, for the sum of five thousand dollars, payable in ten years from date, bearing interest at six per cent per annum, payable annually." The third section provides, that the holder's of said bond shall have a *lien* upon the stock subscribed for said corporation. The fourth section provides for submitting said ordinance to a vote of the qualified voters of said town, &c.

It appears, that on submitting said ordinance to a vote of the corporators, it was approved by a large majority of the voters.

A subsequent ordinance, adopted on the 3d of January, 1852, which recites the former ordinance, and its approval by a majority of the qualified voters, directed the Mayor to make the subscription for said stock upon the books of the company; and to issue the bonds, when necessary, for the payment of the same. The Mayor accordingly made said subscription on the 5th of January, 1852, in the name of the "mayor and aldermen of the corporation of the town of Gallatin," for four thousand five hundred dollars.

On the 1st of October, 1853, five corporation bonds, each for one thousand dollars, payable to said company or bearer, ten years after date, with interest from date at the rate of six per cent per annum, to be paid annually, were issued in proper form, under the seal of the corporation, and likewise signed with the proper name of the mayor.

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Of the questions discussed in the argument here, the only one necessary to be considered, is, whether or not the complainants are entitled, under the circumstances, to be exonerated from their agreement to receive said bonds in part discharge of the debt due to them from the company.

The complainants insist, that they ought not to be compelled to accept said bonds on the ground, mainly, that they are void for want of authority in the corporation to issue them. The defendant contends that the corporation, under its charter, had full power and authority to issue said bonds; and whether this be so or not, is the question for our consideration.

The town of Gallatin was incorporated by an act of the legislature, passed on the 17th of November, 1817. The act declares "that the corporation aforesaid, shall have full power and authority to enact and pass all laws and ordinances necessary to suppress vice and immorality; to preserve the health of the town; to prevent and remove nuisances; to establish night watches and patrols; to ascertain the boundary and location of streets, lots and alleys; to provide for licensing, regulating, or restraining theatrical, and other public amusements within said town; to pave, and keep in repair, the streets; to establish necessary inspections; to erect and regulate markets; to appoint a recorder and high constable; to license and regulate a fire company; to *levy and collect taxes*; to regulate and restrain tippling houses; to impose and appropriate fines and forfeitures; to provide for the sweeping of chimnies; to erect and regulate pumps on the public square, streets, or alleys; or to convey water from the vicinity into the town;

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and to pass all other laws necessary and proper for the good government of said town, and regulating the police thereof; *provided*, they are not incompatible with the constitution and laws of this State."

Under the foregoing power "to lay and collect taxes," the authority to issue the bonds in question is claimed. It is scarcely necessary to repeat the familiar principle, that a corporation is the creature of the law, possessing no power or authority except such as is expressly granted by the charter, or as is necessarily implied. And the simple statement of this principle would seem to be sufficient for the decision of the question before us. No argument can be necessary to show that the authority to purchase stock in a manufacturing establishment, or to issue bonds for the payment thereof, cannot be derived from the power of taxation conferred by the charter. No doubt can be entertained as to the nature or extent of the power "to lay and collect taxes," contained in the charter.

The existence of such a power in the corporation was indispensable, as a means to the accomplishment of the end and object of its creation: the government and necessary police regulations of the town. The powers of a corporation, being the exercise of a delegated authority, are to be strictly construed; and this rule applies with greater force to the power of taxation, from its very nature and liability to abuse.

In ascertaining the extent of the power "to lay and collect taxes," delegated to the corporation, we must look to the general powers specifically granted; and such as result from necessary implication, to the various objects contemplated by the charter, and the duties

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enjoined therein, and as far as the proper exercise of these powers, and the accomplishment and performance of these various objects and duties may require, but no further may the power to raise money, by taxation, be exercised under the charter. If it be desired to possess the power to any greater extent, or for any other purpose, a further delegation of the power must be sought from the legislature.

This case does not require that we should go into the question, what is "a corporation purpose" in the proper sense of our constitution and laws? a question certainly of no easy solution, and one that, generally speaking, may be answered more readily negatively than affirmatively. . We are not, therefore, called upon to determine whether or not, in the case before us, or in any supposable case, the purchase of stock in a "cotton and woollen manufactory," is a "corporation purpose." It may be remarked, however, that if it were held to be so, it would be difficult, perhaps, to imagine any *speculation* that might not be so regarded.

But, without intending to decide a question not properly arising upon the record, we simply determine that the authority attempted to be exercised in the present case, of subscribing for stock, and issuing the bonds of the corporation in payment thereof, was wholly unauthorized by the charter. And, hence, it results that the bonds are utterly void. Being so, we think it clear, that the complainants cannot be compelled to accept them.

The complainants cannot be repelled upon the ground of ignorance of the law. This principle is not applicable to the case for several reasons. Because, from the

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simple statement of the facts, one of the conclusions is inevitable, either that the contracting parties, mutually labored under gross ignorance of the law, or that the complainants were circumscribed by misrepresentation, or concealment, or misplaced confidence; and upon either assumption, the complainants would not be precluded from the relief sought. It is proper to say, however, that there is no just ground for the imputation of fraud on the part of the company.

But the principle has no application, for a weightier reason. The maxim that ignorance of the law is no excuse for the breach or non-performance of any agreement, (because every one is bound at his peril, to know the law,) only applies, as we understand it, to the general or public laws of the land, which affect and prescribe a universal rule of action for the whole community; and, therefore, has no application whatever, to special or private acts of the legislature, which are designed only to operate upon particular persons, or to regulate private concerns.

It follows, therefore, that the decree of the Chancellor, so far as respects the corporation bonds, must be reversed. In all other respects, it will be affirmed.







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1. *In forma pauperis. Rights of non-residents.* The right to institute and prosecute suits in *forma pauperis*, in the courts of this State, is not limited by its laws to the citizens of this State, but belongs alike to the citizens of the other States. *Lissenbee vs. Holt*, 42.
3. *The criterion on a quantum meruit. Jury.* The question in an action on a *quantum meruit* is not alone the benefit and advantage derived by the defendant from the services of the plaintiff, but how much does the plaintiff deserve or merit for the work done or the services performed for the defendant at his request, either express or implied. It may often happen that the defendant derives no benefit or advantage, yet, this may not be the fault of the plaintiff, and would not be any defense to a claim for meritorious services rendered. It must be left

**ACTION—Continued.**

to the jury to determine whether, under all the circumstances, the plaintiff actually deserves, or merits any compensation for the services rendered. *Edington vs. Pickle*, 122.

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1. *Of declaration in ejectment. Statute of limitations.* A new demise may be inserted in the declaration in ejectment, even after the statute of limitations, would have barred the suit, unless it introduces a new or substantive cause of action, which existed when the writ was issued; and such amendment, when made, relates back to the commencement of the suit, and places the case and the rights of the plaintiff upon the same ground as if it had been originally incorporated in the writ and declaration. *Nance's lessee vs. Thompson*, 321.
4. *Rule as to construction of statutes of amendment.* The general rule as to statutes of amendment and *jeofails*, is, that the amendment need not, in fact, be made; the benefit of the statute is obtained by the courts overlooking the exception, and considering the amendment as made. *Eakin & Co. vs. Burger et al.*, 418.

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1. *County Court. Inquisition of lunacy. Act of 1844, ch. 99.* The act of 1844, ch. 99, § 1, which provides, that, "where any person or persons may conceive him, her, or themselves aggrieved by any decree or decision of any county court in this State, he, she, or they, may ask for and obtain an appeal from the decision or judgment of said county court, to the next circuit court of said county," authorizes an appeal from the decision of a county court to the circuit court, on an inquisi-

APPEAL—*Continued.*

tion of lunacy. Upon the return of the inquisition the county court must either receive or reject the same; and from its decree or decision, be it either way, an appeal will lie by the express terms of said act. *Cooper vs. Summers*, 453.

2. *Same. Same.* An order of the county court upon the return of an inquisition of lunacy, that the same be received and entered upon the records, is such an order or decision as an appeal will lie from to the circuit court. *Ib.*
3. *Effect of an appeal. Jurisdiction of the circuit courts.* The appeal given by the act of 1844, ch. 99, § 1, from the decision of a county court to the circuit court on an inquisition of lunacy, can only operate as an appeal in error, or writ of error proper. Upon such appeal the circuit court can only *revise* the proceedings of the county court, and affirm or reverse the same as may be proper. Upon a judgment of reversal, the circuit court has no jurisdiction either to award a writ of inquisition to the sheriff *de novo*, or to empanel a jury to enquire into the fact of lunacy. This jurisdiction is exclusively in the county court. *Ib.*

See PRACTICE.

APPOINTMENT.

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AGENT.

2. *When vessel disabled in transitu. Agency of master. Same.* When a vessel is so disabled during its voyage that it cannot proceed on the same, and the cargo is in peril of loss, the law implies an agency from necessity, on the part of the master, to act for the interest of all concerned; and it is his duty in such case, to tranship the cargo, and he has a right to charge it with such freight as it was proper to give; but it does not follow that he will be entitled to freight *pro rata* for the performance of part of the voyage. *Crauford vs. Williams*, 205.
2. *Implied power of.* An agent authorized to do a certain act, is impliedly invested with authority to do all that is necessary and usual to effect the object of his agency, and all the means justified by usage in such cases may be employed by him, unless such implied authority be expressly negatived by the principal. Thus, an authority to the agent to sell and dispose of a slave, confers upon him full power to make a warranty. *Franklin vs. Ezell*, 497.
3. *Fraud of, how far principal bound by.* The fraud of an authorized agent will avoid a contract entered into by him in behalf of his principal. Although such misrepresentation may be unauthorized by the principal, yet, if he ratify the contract, he will be bound thereby, for he cannot make the contract his own by availing himself of its benefits, and at the same time avoid responsibility for the fraud upon which it is founded. *Ib.*

ANTE-NUPTIAL SETTLEMENT.

1. *Registration. Act of 1881, ch. 90.* All marriage contracts or agreements in which the wife's property before marriage is settled on her,

ANTE-NUPTIAL SETTLEMENT—*Continued.*

or a trustee for her use, since the passage of the act of 1831, ch. 90, must be proven and registered in strict conformity to the provisions of said act as to all matters of substance, or the same will be void as to the existing or subsequent creditors of the husband, or purchasers from him without notice. So the omission of the clerk, in his certificate of acknowledgment, to insert the words "with whom I am personally acquainted," (they being a material part of the formula prescribed by said act to identify the parties,) is fatal to the probate of such instrument. *Johnson vs. Wallon*, 258.

2. *Same.* An acknowledgment of a marriage contract, taken after the marriage, without the privy examination of the wife, is a nullity though the contract were executed before marriage. *Id.*

## ARBITRATION.

2. *Setting aside the award.* Where a mixed question of law and fact is submitted to arbitrators, and it appears from the face of the award, or some writing referred to, or accompanying the same, that the arbitrators intended to decide according to law, but were mistaken as to the same, it is a sufficient reason for setting aside the award, so far as it is affected by the mistake. *Nance's lessee vs. Thompson*, 321.
3. *Same. Motion in arrest of judgment.* Where matters in litigation in the circuit court are, by agreement of parties, ordered to be submitted to arbitrators for settlement, the award, if unsatisfactory to either, must be attacked by motion before judgment to set aside. But it seems that after the award has been confirmed by the judgment of the court, a motion in arrest of judgment may be treated and understood as a motion to set aside the award, though technically irregular. *Id.*

## ASSAULT.

1. *What is an assault?* An assault is an inchoate violence to another, with the present means of carrying the intent into effect. The intention to do harm is of the essence of the offence, and unless it be coupled with the attempt, there can be no assault. The intention of the party is to be ascertained by the jury from the circumstances. *Richels vs. The State*, 606.

## ASSIGNEE.

See NOTES WON AT GAMING.

## ASSIGNMENT.

1. *Of judgment. Notice to the debtor.* An assignment of a *chose in action* is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor; and this is so, not only as regards the debtor, but likewise as to third persons. So, an attachment by a creditor in the period intervening between the assignment and the notice, will have preference over such assignment. *Clodfelder vs. Cox, adm'r, et al.*, 380.
2. *Same. Same.* To perfect an assignment of a *chose in action*, not merely as against the debtor, but also as against creditors and subsequent *bona fide* purchasers, notice must be given to the debtor, and as be-

ASSIGNMENT—*Continued.*

tween successive purchasers, or assignees, he is entitled to preference who first gives such notice. *Ib.*

See INSURANCE.

ARREST OF JUDGMENT.

See ARBITRATION.

ASSUMPSIT.

1. *Contract. Consideration.* Where a contract for rent is made with A, and the tenant promises to make his payment to B, such promise to B is void for want of consideration, unless it appears that he was entitled to receive the rents on the contract of A. *Broddie vs. Johnson*, 464.

ASSURANCE OF TITLE.

1. *Act of 1819, ch. 28.* A title by descent, is an assurance of title within the meaning of the act of 1819, ch. 28. *Wood vs. Wood's lessee*, 279.

ATTORNEY GENERAL.

3. *Where an indictment is preferred by the regular officer, and the cause prosecuted by an Attorney General pro tempore.* It will be presumed that the court would not permit any one to enter upon and discharge the important functions of attorney general, without some valid reason and a regular appointment. So when it appeared of record that the indictment was preferred by the regular attorney general, and the case prosecuted in court by an attorney general *pro tem.*, as to whose appointment the record is silent, there is no error. *Act of 1851-2, ch. 256, § 5. Iham vs. The State*, 111.

AWARD.

See ARBITRATION.

BAILEE.

1. *Carrier. Liability of mandatary.* Where the defendant, a captain of a steamboat, undertakes, without charge, to carry a sum of money for one of his passengers, from one point to another, he is bound to use a degree of diligence and attention adequate to the performance of the trust, and if he be wanting in that ordinary care applicable to his situation, character and circumstances, whereby the money is lost, he is guilty of negligence, and is liable to make indemnity for such loss. *Jenkins vs. Mallow*, 248.

BETTING ON ELECTIONS.

1. *Action to recover money loaned to be bet on an election.* Money lent and applied by the borrower for the express purpose of accomplishing an illegal object, cannot be recovered, and the test whether a demand connected with an illegal transaction can be enforced at law is, whether the plaintiff requires any aid from the illegal transaction to establish his claim. *Bates vs. Watson*, 376.

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See FREEDOM.

BOUNDARY.

4. *Conventional line. Parol evidence.* Where, in defining and proving the boundaries of land, a conventional line is relied upon, title must be

BOUNDARY—*Continued.*

shown in the parties to the agreement, by which such conventional line is established. Parol evidence of such conventional line is admissible, *only*, after legal evidence is adduced that the parties had title to the premises, and therefore, a right to make such agreement. *Rogers vs. White*, 69.

## CARRIER.

1. *Of Passengers.* A common carrier of passengers is one who undertakes for hire, to carry all persons indifferently who may apply for passage. It is not essential that the fare should be paid in advance, or tendered, to establish the relation and reciprocal duties of carrier and passenger; it is enough that it is understood that it is to be paid. *N. & C. Railroad Co. vs. Messina*, 220.
  2. *Same.* To constitute one a common carrier, it is necessary that he should hold himself out to the community as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment. It is not, however, every carrying of passengers for hire, that constitutes a party a common carrier. A party having the conveniences for carrying persons, may in some, or perhaps many cases, carry passengers for hire, when done at the instance of passengers and for their accommodation, without incurring the responsibilities of common carriers. These would be private carriers, and held accountable under rules much less stringent. *Id.*
  3. *Liabilities of Railroad Companies.* A railroad company in engaging in the business of common carriers, undertakes that their road is in good traveling order, and fit for use; and that the engines and carriages employed are road-worthy and properly constructed, and furnished according to the present state of the art; and if an injury results from the imperfection of the road, the carriages or the engines, the company are liable, unless the imperfection was of a character in no degree attributable to their negligence. *Id.*
  4. *Same.* Railroad companies are bound for a due application on the part of their servants and agents of necessary attention, art and skill, to secure the safety of passengers; and they are liable for all injuries which may occur from the negligence or want of skill of their agents, if such injury might have been avoided by the utmost degree of care and skill on the part of their agents and servants. *Id.*
  5. *Same.* A railroad company is liable for any casualty which may occur from running with greater speed than is prudent, or on account of collisions with obstructions, which the engineer or conductor saw, or might have seen, or which he might have avoided by the most skillful and prompt use of all the means in his power. *Id.*
- See CONTRACT.

## CAVEAT EMPTOR.

3. *Purchase at execution sale. Notice of imperfect adverse title.* While a creditor or other person, purchasing at a creditor's execution sale, is not affected by notice of imperfect adverse titles, yet, in a contest



CAVEAT EMPTOR—*Continued.*

with those who rely upon a good and perfect legal title, *caveat emptor* is the rule, and such purchaser must look to and stand upon the title he has purchased. *Bostick vs. Winton et al.*, 525.

CERTIORARI AND SUPERSEDEAS.

1. *Motion to dismiss.* *The court may look to the whole record brought up by certiorari.* The whole proceedings of the magistrate, as presented in a case properly brought up by certiorari, should be taken into view by the court upon a motion to dismiss. They may be regarded as part of the petition, and are not extrinsic matter in contemplation of law. *Edde vs. Cowan*, 290.
2. *Same.* The question for the determination of the court on a motion to dismiss a certiorari, is: are the facts stated in the petition negatived by the papers brought up by the certiorari, or do they, when taken together, remove the grounds upon which the case made in the petition rests? If so, the motion should be sustained. *Vide 8 Humph.*, 703. *Ib.*
4. *Petitioner's surety. His liability.* Where the petition only complains of the execution which it seeks to supersede, grounded on some matter of discharge subsequent to judgment, and makes no objection to the judgment itself, such proceeding is in the nature of an *audita querela*, and the security is not liable for the debt, but only for the costs. *Vide 10 Yerg.*, 252. *Ib.*, 291.  
See PRACTICE.

CHANCERY.

2. *Decree creating Trust. Construction.* Where a trust valid in itself, is created by a decree of the chancery court, so inartificially phrased as to vest no legal title to the realty embraced therein in the trustee; such decree should be so construed as to give effect if possible to the purposes of the trust. So where upon a bill filed on behalf of a *feme covert*, to have certain real and personal property settled upon a trustee for the sole use and benefit of herself and children, excluding the marital right of her husband, and the court declare in an interlocutory decree, that "said property ought to be vested in a trustee for the use and benefit of said complainant," and in its final decree, appoints a "trustee, to take charge of the property both real and personal belonging to said complainant," without formally vesting him with the legal title: *Held*, that said trustee, from the very nature and objects of said trust, may maintain all such actions for injuries affecting the real estate placed in his "charge," as requires merely an actual possession for their support, and not a legal title. *Rogers vs. White*, 68.
4. *Practice. Bill of interpleader.* The complainant, in a bill of interpleader, must present a case as to which the defendants are required to interplead; he should state his own rights, and thereby negative any interest in the thing in controversy; and he should set forth the several claims of the opposing parties. *McEwen, adm'r., vs. Troost, et al.*, 186.

CHANCERY—*Continued.*

2. *Answer. Construction. Waiver.* Where one of several to whom an equity of redemption has descended, as tenants in common, refuses to join in a bill filed by his co-heir, to enforce the equity, but answers said bill, assigning his reason for not so joining to be, that he feared the proceeding might fail and costs be incurred, and stating further that he questioned the validity of the tender made by the complainant; referring the matter to the chancellor to determine, and that he preferred that the title should remain in the purchaser who is more needy, rather than go to the party making the tender: *Held*, that this language does not amount to a *waiver* or relinquishment of his interest in the land as one of the heirs. *Gentry et al. vs. Gentry et al.*, 87.

See PRACTICE. RES JUDICATA.

## CESTUI QUE TRUST.

See LIMITATIONS.

## CHARTER.

3. *Construction. Abandonment of franchise. Its effects upon the rights of riparian owners as to damages.* The charter of the Duck River Slack Water Navigation Company authorizes the erection of locks and dams to effect the purposes of the same, and gives to the owners of land overflowed by the erection and continuance of any such dam, a summary remedy for the assessment of their damages by a jury of view, whose report is to be returned to the circuit court, and judgment had thereon; and provides that the court may, at the same time, condemn and vest such land as may have been overflowed, and for which damages have been assessed in said corporation, upon the payment of the value assessed to the party entitled thereto, or into court for his use: *Held*, that an abandonment in good faith by the company of the scheme contemplated in the charter, and removal of the cause of injury, established by evidence of a character, to bind the company, made at any time before the final judgment upon the report of the jury, would take away the right of the party injured to insist upon the value of his property and transfer of title, and leave him to recover such damages, under all the circumstances of the case, as he may have sustained by the erection of such dam during its continuance. *Stevens et al. vs. The Duck River Navigation Co.*, 287.

See CORPORATION. RIGHT OF WAY.

## CONFESSIONS.

4. *Other facts discovered by.* It is a rule of law, that where important facts are discovered in consequence of the confessions of a prisoner, improperly obtained, so much of said confession as strictly relates to the fact discovered by it, may be given in evidence, and it becomes competent only from the fact that its truth is verified by the discovery. *Deathridge vs. The State*, 76.

See CRIMINAL LAW. EXTORTED CONFESSIONS.

## CONSTITUTIONAL LAW.

1. *Charter of the Union Bank. Interest.* The grant in the charter of the Union Bank of Tennessee, passed in 1832, allowing the bank to demand

CONSTITUTIONAL LAW—*Continued.*

and receive interest in certain cases therein specified, at the rate of seven per cent per annum, is a valid franchise not repugnant to the constitution. *Hazen vs. The Union Bank of Tennessee*, 115.

1. *County and corporation purpose.* The construction of a railroad through a county, or municipal corporation, is a county or corporation purpose, within the meaning of § 29 of art. 2, of the constitution of Tennessee. *Louisville & Nashville Railroad Co. vs. The County Court of Davidson county*, 637.
2. *Submitting the question of a railroad tax to a vote of the people.* The reference to a vote of the people, of the question of subscription or no subscription of stock in a railroad company, as prescribed in the act of 1852, ch. 117, does not invalidate the act by bringing it in conflict with the constitution. *The powers of the legislative and judicial departments examined and expounded. Ib.*
3. *County courts. Their powers and duties under the act of 1852, ch. 117.* The act of 1852, ch. 117, regulating county subscriptions to railroads, confers no discretionary power upon the county courts to levy a tax, appropriate money, or create a debt. All this is referred to the people. The duties devolved upon said courts by said act, are, therefore, ministerial merely—not judicial. They are bound to carry out the edict of the people under the mandate of the law. *Ib.*
4. *Same. Jurisdiction of the quorum court.* When, by an act of the legislature a new power is vested in the county court, or a new duty devolved upon it, and no particular number of justices is specified, any number which may constitute a legal court, can perform it. *Ib.*

See CORPORATION. FRANCHISE. PRIVATE WAY.

## CONTRACT.

1. *Rule of construction. Intention.* The sole object of the rules and principles laid down for the exposition of contracts, is to do justice to the parties by enforcing a performance of their agreement, according to the sense in which they mutually understood it at the time it was made. The governing principle of construction is the intention of the parties; and that intention may be ascertained by looking to the situation of the parties, the motives which induced the agreement, and the objects and purposes designed to be effected by it. *McNairy vs. Thompson et al.*, 141.
2. *Same.* In expounding a deed or other instrument, the construction must be upon the entire writing, so that one part may help to expound the other; and all its *recitals* may be looked to and used to explain any doubts which may arise as to the intention of the parties. *Ib.*
3. *Covenant of indemnity. Construction.* W. H. M. & M. M. H., who were merchants, executed and delivered to the covenantees, the following covenant—to-wit: "Whereas, J. M. H. and M. H., executor and executrix of the estate of G. W. H., did, on or about the 31st day of December, 1850, make and execute the following notes, which were signed by them as executor and executrix of said estate;" [describ-

## CONTRACT—Continued.

ing five several notes, amounting to \$2,709:] and whereas, four of the above notes, amounting to \$2,159, were given to the Planters' Bank, and the other note for \$550, was given to the Union Bank, in renewal of notes made and drawn by [their testator] the late G. W. H., upon which we were endorers, and which were then due and under protest; and whereas, it was at our request and for our especial benefit and accommodation that the said J. M. H. and M. H., consented to become the drawers of the above described notes; in view of the above facts, we, the undersigned do, by these presents declare, that we do not hold the said M. H. and J. M. H. personally responsible or bound; and we do hereby release them from all *personal* obligation to pay said notes, and will not look to them for the payment of the same, any further than the said estate may be able to pay." *Held*, that said instrument, in its legal effect, is a covenant to indemnify J. M. H. and M. H. against personal liability, and to prevent their suffering loss or damage in consequence of having become makers of the several notes therein specified; and that from the situation of the parties at the time of its execution, the motives which prompted it, and the end to be effected by it, it imports an absolute engagement on the part of the covenantors, to "release" and exonerate the covenantees from the payment of said notes, except so far as the assets of the estate in their hands, might, in due course of administration, enable them to pay; and that said covenant was broken the instant the covenantees became liable to pay the notes. *Ib.*

1. *Carrier. Freight pro rata itineris.* Where a carrier's right to freight is founded in contract, it must appear that he has performed its conditions, or that he has been excused performance by the owner of the cargo, to entitle him to demand it. So, where the master of a vessel contracted to deliver his cargo at its port of destination for a stipulated price, and after performing the greater part of his voyage, was prevented by inevitable casualty from prosecuting it further, but transhipped the cargo to another vessel without the knowledge of the owner of the cargo, and upon a contract for such transshipment of three times the amount of his original contract, which the owner had to pay on delivery of the cargo at its port of destination; said master is not entitled to his freight *pro rata* for so much of the voyage as he actually performed under his contract, between the port of original shipment and the port of necessity. *Cranford vs. Williams*, 205.
1. *Claim of recoupment of damages when available.* To entitle a defendant when sued upon his contract, to a reduction of the plaintiff's recovery in the way of recoupment of damages for the partial failure of the plaintiff to perform his contract, the damages he claims must be capable of computation with reasonable certainty and precision, and such as he might recover in a cross action against the plaintiff. *Petee vs. The Tennessee Manufacturing Co.*, 381.
2. *Same. Illustration of the rule.* To subject mere speculative profits and losses of interest upon capital, when claimed by the defendant in recoupment, to the operation of the rule, they should be shown to have

CONTRACT—*Continued.*

been within the contemplation of the parties when the agreement was made, and should be stipulated for in the contract itself. The rule would be otherwise, too vague and indefinite; unlimited discretion would be left to the jury. Thus, when the plaintiff, a machinist, brought his action against a manufacturing company for machinery sold and delivered to them, and the defendant claimed a recoupment of the plaintiff's recovery by reason of his failure to deliver the machinery by the time stipulated for in the contract, to the amount that they would have realized from running the factory during the delay so occasioned by the non-delivery of the machinery, and for their losses of interest upon capital paid in and lying idle during said delay. Such claims being for merely speculative profits, are not the subjects of a cross-action, and therefore not the subjects of a recoupment. *Ib.*

1. *Constitutional law. Act of 1850, ch. 121, as it affects deeds of trust made before its passage.* The act of 1850, ch. 121, which provides "that in all sales of real estate hereafter to be made under execution or deed of trust, which, by existing laws, is subject to redemption, if the debtor is permitted by the purchaser or his assignee to remain in possession, he shall not be liable for rent from the date of the sale to the time of redemption; and if the purchaser or assignee shall take possession under his purchase, upon the redemption by the debtor, he shall be entitled to a credit for the fair rent of the premises during the time they were in possession of the purchaser," so far as it relates to sales under deeds of trust, executed anterior to its passage, is unconstitutional and void. *Greenfield vs. Dorris*, 548.
2. *Power of the Legislature over.* The legislature has power to declare the force and effect of future contracts, made and to be executed in this State. This is an unrestricted power to be exercised at discretion, for the public advantage. As to existing contracts, it is equally well settled that the legislature has power over the remedy, but no power over the contract, as that is secured and protected under the sanctity of the constitution. *Ib.*
1. *Rights and liabilities of lessor and lessee, where the premises become untenable pending the lease, without fault on the part of the lessor.* No warranty results by implication of law, as to the continuing condition of property demised by lease. The only implied warranty is as to title, and any acts by or under the landlord, which could affect the use of the property. Against every other event or contingency the lessee must provide by express stipulation, in order to exonerate himself from the payment of the rent. *Banks et al. vs. White*, 618.
1. *Revocation. Executory contract. Sale of land by, previously devised.* Where a testator, by executory contract, sells land which he had previously devised by will, in the view of a court of equity, such sale operates as a revocation of the will *pro tanto*, provided the contract of sale be such as the court can, in view of well settled principles, specifically execute. *Donohoo vs. Lea*, 1 Swan R., cited and approved. *Blair and Gillenwaters, adm'rs vs. Snodgrass and Lyon, et als.*, 1.

CONTRACT—*Continued.*

4. *Vagueness. Parol proof to explain.* It is a well settled rule under the statute of frauds, that when divers writings are relied upon to elucidate a contract for the sale of land, parol proof is not admissible to connect or explain them, or to show that the several writings relate to the same transaction. *Id.*
1. *For personal service. Where the employee abandons his employer without good cause, before he has performed the whole service contracted for.* To entitle a party to recover for personal services rendered under contract, he must show as a condition precedent, that he has performed the service agreed upon, or a good and sufficient reason for his failure to do so. Thus, when the plaintiff contracted to labor on the defendant's farm for eight months, for a stipulated price, and after laboring for three months, voluntarily abandons his employer without his consent, merely because he could get better wages elsewhere, he can recover nothing for the time he so served. *Hughes vs. Cannon*, 622.

See ILLEGAL CONTRACT. FRANCHISE. RIGHT OF WAY. ASSUMPSIT.

## CONSIDERATION.

See PLEADING. ASSUMPSIT.

## CONDITION.

See RIGHT OF WAY.

## CONSTRUCTION.

See WILL. CHANCERY. CHARTER.

## COMMISSION.

See DEPOSITIONS.

## COUNTY COURT.

*Jurisdiction.* The act of 1797, ch. 41, § 1, conferring upon the county courts jurisdiction over the estates and persons of idiots and lunatics, does not extend to persons disabled by age or bodily infirmity. Such jurisdiction belongs to the chancery courts by the act of 1852, ch. 163, by which the chancery courts have also concurrent jurisdiction with the county courts over the persons and estates of idiots and lunatics. *Cooper vs. Summers*, 458.

See PRIVATE WAY. SPECIAL ADMINISTRATION. APPEAL. CONSTITUTIONAL LAW.

## COUNTERPART OF WRIT.

See ACTION.

## COVENANT.

1. *Where one covenants in his own name, stating it to be for another. Right of action.* If a person covenant in his own name, he is personally bound, though he state it to be in a representative character, as executor, guardian, trustee, committee, agent, or otherwise. Thus, where persons representing themselves as a committee on behalf of a Masonic lodge, contract in the name of said lodge, with a mechanic for the

COVENANT—*Continued.*

building of a lodge room, and in a covenant obligate themselves for the payment of the price, they alone are liable to and can maintain an action on said covenant. *Steele vs. McElroy*, 841.

## CONVENTIONAL LINE.

See BOUNDARY.

## CORPORATION.

2. *Legislative power over. Contract.* The power to grant corporations is an incident of sovereignty, and belongs to every sovereign State. The act of incorporation being legal in itself, is a contract between the State and the corporators, investing them with a legal estate in the franchises named in the charter, and being such a contract, it is under the protection of the Constitution of the United States, and is irrevocable and inviolable by any act of the Legislature of the State, or a convention of the State. Vide 4 Wheaton R., 318. *Hazen et al. vs. The Union Bank of Tennessee*, 115.
1. *Acceptance of charter. Liability of stockholders.* A subscription of stock in a corporation, made before the charter is accepted by the company, is not binding on the subscribers, and may be withdrawn at any time before such acceptance. *Gleaves vs. The Brick Church Turnpike Company*, 491.
2. *Evidence. What is an acceptance of a charter.* The acceptance of a charter may be inferred from acts done in pursuance of its provisions. It is not indispensable to show a vote of acceptance, or written agreement to accept. *Ib.*
3. *Subscription of stock before acceptance. When it is binding.* It seems that a subscription of stock by one of the corporators after the act of incorporation, though before the regular organization of the company, but made with a view to, and in anticipation of a subsequent organization, would be binding on him after a regular organization under the charter, although there may have been no express concurrence on his part in the acceptance of the charter and organization of the company. *Ib.*
1. *Power of a municipal corporation to take stock in a manufacturing company.* A corporation is the creature of the law, possessing no power or authority except such as is expressly granted by the charter of incorporation, or as is necessarily implied. So the power to levy and collect taxes in the charter of a municipal corporation, does not authorize the purchase by said corporation, of stock in a manufacturing company, or the issuance of bonds for the payment thereof, and bonds issued for such purpose under said charter are utterly void. *Cook & Steadman vs. The Sunner Spinning and Manufacturing Co.*, 698.

See CRIMINAL LAW.

## COSTS IN CIVIL CASES.

2. *Act of 1852, ch. 146. Practice. Construction.* The act of 1852, ch. 146, repeals the act of 1811, ch. 91, and provides "that in all suits for the recovery of damages occasioned by the overflowing of water,

COSTS IN CIVIL CASES—*Continued.*

by the erection and keeping a grist-mill, saw-mill, or other water-works, the successful party shall be entitled to full costs as provided in the act of 1794, ch. 1, § 74 ;" with the *proviso*, "that if the judgment for damages does not exceed five dollars, the plaintiff shall not recover more costs than damages;" but makes no provision as to the residue of costs in cases contemplated by the proviso: *Held*, that the proper practice in reference to the residue of the costs in cases contemplated by said proviso, is to give judgment against each party for his own proper costs; and that the act of 1852, ch. 146, embraces within its provisions, all judgments rendered in this species of action after said act took effect, irrespective of whether the suit commenced before or after its passage. *Gardensire vs. McCombs et al.*, 83.

## CREDITOR.

See PAYMENT. SPECIAL ADMINISTRATION.

## CRIMINAL LAW.

3. *Indictment. Essential averments.* Where the act for which a party is indicted, is not in itself unlawful, but becomes so by other facts connected with it, the facts in which the illegality consists, must be set forth and averred. *Pearce vs. The State*, 64.
1. *Evidence. Confessions of guilt.* Great weight and credit are justly due to confessions of guilt, when they appear to proceed merely from a sense of guilt, and not from the influence of hope or fear in any degree; for we are to presume, in the absence of *influence* and *motive*, a person who is innocent of crime will not confess himself guilty. But a confession which is the result of hope or fear, excited in the prisoner by one having power over him, is incompetent, as it can have no tendency to establish the guilt of the prisoner. A person not of strong character, overawed and subdued by a criminal charge, involving the ruin of himself and all dependent upon him, may, under influence, confess himself guilty when he is innocent. *Deathridge vs. The State*, 75.
1. *Juror. Exception propter defectum after verdict, when no objection taken before.* The circuit judge is the trier of all questions appertaining to the qualifications of jurors. It will be presumed that his action is correct, unless he is put in the wrong by exceptions upon the record setting forth the facts upon which he decided. So, when in a capital felony the record did not show that the jurors who tried the prisoner were good and lawful men, or that they were freeholders or householders, but did show that they "were elected, tried and sworn," and that no objection was made to either of them until after the verdict, it is no sufficient ground for a reversal of the judgment upon a conviction. *Vide McClure vs. The State*, 1 Yerg., 215, per Catron, J. *Ishan vs. The State*, 111.
1. *Corporation. Indictment.* An incorporated turnpike company may be indicted under its corporate name for suffering their road to be out of repair, to be acted upon through the medium of the officers who represent it; or the proprietors of a turnpike, or the keepers thereof, may be indicted by their proper names for the same offence, stating their



CRIMINAL LAW—*Continued.*

relation to the road as owner or keeper. *Red River Turnpike Co. vs. The State*, 474.

See TECHNICALITIES. INDICTMENT.

DAMAGES.

1. *In actions ex contractu.* In actions of contract to recover damages for breach, generally speaking the damages are limited to the natural and proximate consequences of the breach complained of; and damages remotely or consequently resulting therefrom, or merely speculative damages, cannot be claimed *Walker & Langford vs. Ellis & Moore*, 515.
2. *For breach of specific contract.* In an action for a breach of a specific contract, the party injured is bound to use proper means and efforts to protect himself from unnecessary loss or damage, and can charge the other party only for such damages as by reasonable endeavors and expense he could not prevent. Thus, in a suit upon a breach of a contract, by which the defendant had engaged to put up machinery for a mill, and to place the same in successful operation, if the adaptation of said machinery to the purpose in view could as well have been tested in a day or a week as in a month or a year, the delinquent party cannot be subjected to the increased expenses resulting from the continued unavailing experiments persisted in by the other party to test the operation of said machinery. *Id.*

See RIGHT OF WAY. TURNPIKE COMPANY. EVIDENCE.

DEDICATION.

See HIGHWAY.

DEBT.

See LIMITATIONS.

DECREE

2. *What is an interlocutory, and what a final decree.* A decree is interlocutory when it is made in the progress of a cause, referring certain matters of law or fact to the master or to a jury, or a commissioner, to be ascertained preparatory to a final decree; in which, though the principles governing the rights of the parties may be settled by its terms, yet a more perfect ascertainment of the facts to which they apply, is necessary to a final disposition of the case. A decree is final when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court and fully and clearly ascertained on both sides, so that the court is enabled upon a full consideration of the case made out, *finally* to determine between them according to equity and good conscience, leaving nothing for the future judgment of the courts. *Delap et al. vs. Hunter et al.*, 101.
3. *When a decree may be final, even where it directs a reference to master.* A decree may be final although it directs a reference to the master, provided it contains in itself all the consequential directions that may depend upon the result of the report, when no further decree will be necessary in the case. *Id.*

See CHANCERY.

## DEED.

See EVIDENCE.

## DELIVERY OF DEED.

3. *When presumed without proof of formal delivery.* Where the donor delivered the deed to the register for registry, and directed the same to be recorded, or subsequently assented thereto, it seems that such acts are equivalent to an actual delivery and acceptance. So, where the deed appears to be regularly executed and acknowledged by the donor, and registered, and the donor, a few days before his death, recognized its existence and declared his purpose that it take effect, and the donees assent to the deed and claim the subject of the gift under it, a delivery and acceptance may be inferred without any proof of a formal delivery. *McEwen, adm'r, vs. Troost, et al.*, 186.

## DEMURRER.

See PLEADING.

## DEPOSITIONS.

1. *Act of 1852, ch. 161. Commission abolished by* The act of 1852, ch. 161, authorizing either party litigant in any of the courts of this State to take depositions upon giving legal notice to the opposing party in all cases in which they may by law be taken, without an order from court or affidavit before, and order of the clerk as before the passage thereof, abolishes the commission for that purpose, and renders it unnecessary. [McKINNEY, J., dissented.] *Hoover vs. Rawlings*, 287.

See PRACTICE.

## DEPUTY SHERIFF.

See SHERIFF.

## DOMICIL.

1. *Residence of a married man's family.* In the legal idea of a domicile, *home, residence and business*, are material elements. That is properly the domicile of a person, where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. The place of residence of a married man's family, though not always his domicile, is nevertheless a fact from which the domicile may be presumed. But this is a presumption of fact and not of law, subject to be removed by proof to the effect that the true domicile is at a different place from that of the family residence. *Pearce vs. The State*, 63.

## DOWER.

2. *Order pro-confesso against infants. Notice. Practice.* In a proceeding to have dower assigned, where there are minor children of the intestate, the proper practice, after notice of such proceeding to the minors, is, for their guardian to answer and make a true and proper defense, if any exist. The service of notice upon the guardian, and his failure to make defense, does not authorize an order *pro-confesso* against the infants. *Rutherford et al. vs. Richardson and wife*, 609.

## DYING DECLARATIONS.

See EVIDENCE.

## EASEMENT.

2. *As contradistinguished from the right of soil. Charter. Construction.* A mere easement is separate and distinct from the right of soil. The one may be granted without the other, and may exist in different persons at the same time. A charter granted by legislative act to an individual or a company, is a contract, is a grant; and when accepted and acted upon, becomes as obligatory, as inviolable, and as irrevocable as the contract of grant of an individual, and subject to the same rules of construction. *Davis vs. E. T. & Ga. R. R. Co.*, 95.

See CHARTER.

## EJECTMENT.

- Sheriff's deed. Possession of defendant. When a presumption of title.* Where a plaintiff in ejectment relies upon a sheriff's deed, founded upon a judgment and execution against the execution debtor in possession, under which a sale was properly made, he must show that the defendant was in the actual possession of the land sued for at the time of the levy and sale. 3 Hum h., 129. *Ib.*, 16. 8 Humph., 689. *Hamilton vs. Jack & McAlister*, 81.
2. *Effect of execution sale in divesting title. Act of 1819, ch. 28, § 2. To what extent possession of judgment debtor protected.* In an action of ejectment for land bought by the plaintiff at execution sale, sold as the property of the judgment debtor and defendant in ejectment, who relies upon his seven years' subsequent adverse holding as a defense to such action, he cannot by virtue of the act of 1819, ch. 28, § 2, be protected in such possession to the extent of the boundaries of said land as he held it under his title prior to such execution sale, but only to the extent of his actual enclosures. The execution sale divested the defendant of all title, and his possession after the sale was that of a tenant by sufferance, which could only be protected to the extent of his actual enclosures, as they existed for seven years prior to the institution of the suit in ejectment. *Thomasson's lessee vs. Keaton*, 155.
  1. *By purchaser at execution sale claiming under sheriff's deed. Possession of defendant.* In an action of ejectment brought by the purchaser at execution sale, claiming under the sheriff's deed, against the execution debtor in possession, it is indispensable to authorize a recovery without a regular deraignment of title from the grantor, that it be shown that said execution debtor was in the actual possession of the land at the date of the levy and sale. Vide *Hamilton vs. Jack & McCallister*, ante. *Pratt vs. Phillips*, 543.
  2. *Same. Possession of the tenant of execution debtor.* The rule of law, that a purchaser at execution sale in an action of ejectment against the execution debtor, who is shown to have been in possession at the time of the levy and sale, need not go beyond the sheriff's deed; and the record upon which it is founded embraces also the tenant of such execution debtor, who may be the defendant in ejectment; but in such case privity in estate must be shown, or the plaintiff's title must be regularly deduced from the grant. *Ib.*
  5. *Against execution debtor in possession under equitable title merely.* In an action of ejectment by a purchaser at sheriff's sale against the exe-

EJECTMENT—*Continued.*

cution debtor in possession at the time of such levy and sale, if it be shown that the execution debtor at the time of such levy, had only an equitable estate in said land, such sale would communicate no title to the purchaser, notwithstanding the execution debtor may have acquired the legal title in the interval, between the levy and sale. *Ib.*

See EVIDENCE. AMENDMENT.

## ELECTIONS.

5. *The meaning of the words "a majority of the voters of the county."* When a question or an election is put to the people of a county, and is made to depend upon the vote of a majority of the voters of said county, the only proper test of the number entitled to vote in such election, is the result thereof, as determined by the ballot-box. *Louisville & Nashville R. R. Co. vs. The County Court of Davidson et al.*, 638.
6. *When county election contested for failure of the sheriff to open the polls in one or more civil districts.* The mere fact that the sheriff failed in a county election, to open the polls in one or more precincts, does not, of itself, invalidate the election. To have that effect, it must appear also by the facts, that such failure did, or might have affected the general result of the contest. The *onus* in this respect, is upon the contestants. *Marshall vs. Kernes*, 2 Swan, 68, cited and approved as explained. *Ib.*

## EMANCIPATION.

1. *Acts of 1831, ch. 102—1842, ch. 191, and 1849, ch. 102.* The act of 1849, ch. 102, repeals the act of 1842, ch. 191, regulating the emancipation of slaves in this State, and restores in all its rigor, the act of 1821, ch. 102. So, where a testator dying in 1850 made a bequest of freedom to certain slaves provided they could remain in this State as free persons of color, and if they could not remain in this State, directed the sale of said slaves, and the division of the proceeds of said sale among certain legatees named in the will; such a conditional bequest does not show a general predominating intention to emancipate where the mode and means are secondary, but the intent is dependent upon the condition, which being unlawful, said slaves are not entitled to their freedom, but must be sold and remain in bondage by the express provisions of the will. [For the present condition of the law upon this subject, see act of 1854, ch. 50, and post, *Lancaster vs. Boon*.] *Bridgewater, ex'r of F. Pride, vs. The Legatees of Pride*, 195.
2. *Will. Construction.* Where a testator bequeaths freedom to a number of his slaves, to take effect upon certain conditions, and in the event said conditions cannot be performed, directs the sale of a certain number of said slaves for division among the legatees, excepting out of said sale certain of the number whom he directs his executor to take charge of and treat kindly, but to set free as early as practicable, it is the duty of the executor to take charge of the slaves so excepted, in obedience to the will, and to emancipate them as soon as it is practicable in compliance with the law. *Ib.*

EMANCIPATION—*Continued.*

2. *Act 1853-4, C. L. Jurisdiction. Construction.* The provisions of the act of 1853-4, C. L., apply to any court in which a suit for freedom may be brought, as well as the circuit court. This act was doubtless intended to supercede all others, as to the terms upon which the assent of the State should be given, to the emancipation of slaves, and establishes a uniform mode of proceeding, taking from the owners and the court all discretion upon the subject. They must be sent to the western coast of Africa; there is no alternative. *Boon vs. Lancaster*, next friend, &c., 577.

ENTRY.

See LAND LAW.

ENDORSERS.

*Their rights against prior endorsers.* A second endorser of a bill of exchange, who has paid the debt or any part thereof, under legal compulsion, may recover the same of his prior endorser in an action of assumpsit as for money paid to defendant's use, and is not obliged to resort to his remedy on the bill. *Turpin vs. Williams*, 397.

EQUITABLE TITLE

See EJECTMENT.

EVIDENCE.

3. *Accusation and denial.* Where a prisoner is accused of crime and remains silent under the charge, such fact may go to the jury as a circumstance for such inference as it may reasonably warrant; but if the prisoner deny the accusation, such denial reduces it to a mere charge, and it is error to allow it to go to the jury. *Deathridge vs. The State*, 76.
5. *Husband and wife. Money paid by husband, for wife dum sola.* Where M. H., a *feme sole*, had become bound to pay the debt of another, which was paid by J. H. in contemplation of marriage with the said M. H., and after marriage they bring their joint action to recover back the money so paid, it must be shown, in order to entitle them to recover in said action, that the payment so made on account of the wife, was made at her request, or with her knowledge and consent. The want of proof in this respect cannot be supplied by inference from the fact of their marriage soon after said payment. *McNairy vs. Thompson*, et al., 142.
1. *In an action for replevin against officer for property taken under execution.* When a defendant in an execution which is *prima facie* regular and valid, brings his action of replevin against an officer for property levied upon by virtue of said execution, he cannot show in support of said action that the judgment upon which the execution was founded has been paid. If, indeed, such be the fact, the debtor must resort to his remedy by petition for a *supersedeas*, and the issue of payment must be tried with the creditor, and not with the officer, who looks only to the process in his hands. *Mason vs. Vance*, 178.
3. *Meaning of witnesses.* The meaning of a witness on a jury trial is a matter for the judgment of the jury, to be judged of by the lan-

## EVIDENCE—Continued.

guage used ; and it is error for the court to undertake to interpret it. *McGaveck vs. Wood et al.*, 181.

1. *Dying declarations.* Declarations made merely in fear or apprehension of death, are not admissible as evidence. To render them admissible as dying declarations, they must be made in view of impending and inevitable death, and when the party is conscious of the fact. When thus made, in a condition so impressive, when there is no hope of time and no motive to falsehood, they carry with them as high a guaranty for truth, as if made under oath. *Brakefield vs. The State*, 215.
1. *Witness. Interest.* In an action for malicious prosecution, where the plaintiff relies upon a peace warrant, sworn out by the defendant against him, and upon which he was arrested, as the foundation of the action, it is competent for the plaintiff, or his security for costs, to show by affidavit the loss of said warrant, but neither can be allowed to prove its contents further than is necessary for identification, as such proof goes to the merits, and must come from a disinterested source. *Pharis vs. Lambert*, 228.
2. The valuable rule that the best evidence within the power of the party shall be produced, admits of no evasion. So where, in proving the loss of a peace warrant which was the foundation of an action for malicious prosecution, it was shown that said warrant was last in the hands of one of the plaintiff's counsel, it is indispensably necessary, before proof can be heard of the contents of said warrant, that said counsel should be sworn, if in reach of process, to account for the non-production of said warrant. *Ib.*
2. *Before a jury of view under a writ of ad quod damnum.* Where a charter authorizes the assessment of damages against the corporators for injuries done to land for carrying out the purposes of the same, by a jury who are required to "go on the premises" and assess the damages thereto, such jury have no right to examine witnesses, but the jurors themselves are the witnesses respecting the facts in question, and their report must be based upon their own estimate of the damages after a personal inspection of the premises. *Stevens et al. vs. The Duck River Navigation Co.*, 237.
2. *Identity of stolen Bank Note.* Where the indictment for larceny, charged a bank bill the article stolen, as a bank note of three several banks of Tennessee, and the owner could only prove that it was on one of the three banks named; and the prisoner confessed his guilt as charged, and that he had passed a Tennessee bank note of the denomination stated soon after the felony: *Held*, that the jury were well warranted in the conviction of the prisoner, and in the conclusion that the bank note passed by the prisoner, was the same lost by the prosecutor. *Baldwin vs. The State*, 411.
4. *Parol proof to contradict the date of a deed.* On a trial in ejectment in a court of law, parol proof is inadmissible to show that a deed was in fact executed on a different day from that which it bears date. *Pratt vs. Phillips*, 543.

**EVIDENCE—Continued.**

2. *Evidence of intent.* The act of pointing a pistol at another within shooting distance, is not, of itself, an assault, unless the party intended harm thereby. It would, however, be evidence of an intent to do harm, unaccompanied by other acts or words evincive of the absence of all criminal intent. *Richels vs. The State*, 606.

See CONFESSIONS. CRIMINAL LAW. LOST INSTRUMENT. MALICIOUS PROSECUTION. LAND LAW. MOTION. NEW TRIAL. PARTNERSHIP. PAYMENT. SHERIFF'S RETURN. SLANDER. TENANTS IN COMMON. BOUNDARY.

**ESTOPPEL.**

See REFLEVIN.

**EXECUTION.**

3. *Scire facias to set aside satisfaction.* Act of 1847, ch. 191. The meaning and intention of the legislature by the act of 1847, ch. 191, authorizing the creditor whose execution has been levied upon property as the property of the debtor, and satisfied by the sale thereof, in the event said property or the value thereof is afterwards recovered by some third person claiming the same, to have said satisfaction set aside and the judgment revived, was to embrace all cases where it turned out that the creditor gets nothing by the sale, on account of the failure of the debtor's title to the property sold, whether the same be real or personal. *Edde vs. Cowan*, 291.

See MOTION.

**EXECUTOR.**

See WILL.

**EXECUTORY DEVISE.**

See WILL.

**EXTORTED CONFESSIONS.**

2. *Presumption of law.* When a prisoner has once confessed himself guilty of a crime under the influence of hope or fear, any confessions he may thereafter make, will be presumed to have been made under the same influences, unless the contrary be shown. The *onus* in this respect, rests upon the State. *Deathridge vs. The State*, 75.

**ESCHEATS.**

1. *Action to recover lands escheated.* By our law, upon the death of an owner of real estate intestate and without heirs, the title vests directly in the State, and an action to recover the same can only be maintained in the name of the State. So that, although escheated property is to be appropriated to the use of common schools, and placed under the control of the board of commissioners of common schools, to be disposed of in such manner as they may deem best for the interest of the school fund, yet the legal title vesting in the State at the death of such intestate, the action cannot be maintained in their name for its recovery, but must be brought in the name of the State. *Puckett vs. The State*, 355.

ESCHEATS—*Continued.*

2. *Statute of limitations.* Seven years adverse holding of escheated lands does not vest title under the act of 1819, as the proviso to the third section of said act declares that said act shall not affect lands reserved for the use of schools. *Id.*
3. *Widow. Act of 1850, ch. 54.* By the act of 1850, ch. 54, it is provided that hereafter when any person shall die intestate, leaving no heirs capable of inheriting, but leaving a widow, said widow shall take in fee simple all the real estate of which her said husband died seized and possessed; and the second section of said act extends its provisions to all cases where persons have heretofore died intestate as well as those who may hereafter die intestate: *Held*, that, to say nothing of the unconstitutional feature of the second section, it can have no application in favor of the heirs of a widow who died previous to its passage. *Id.*

## FORCIBLE ENTRY AND DETAINER.

1. Where the plaintiff in a proceeding in forcible entry and detainer, had removed from the premises, but indicated by barring the doors of the house that he had no intention of abandoning the place, and afterwards casual trespassers entered by force and held possession for a while, and on leaving the same, left the doors open, when the defendant without concert with the trespassers was put in possession under a claim and without force, he is not liable to the summary remedy of forcible entry and detainer, but only to an action by which the strength of title can be tested. *Greer vs. Wroe and Wife*, 246.

## FINAL DECREE.

See DECREE.

## FRANCHISE.

1. *Contract. Constitutional law.* A grant by charter, from the legislature, of an exclusive right to build a toll bridge within certain limits, although a contract, is such an exclusive right as must yield to the public interest, and the franchise acquired under it may be taken for the public use upon just compensation being paid therefor, without violating said contract or impairing its obligation in the sense of the constitution. *Red River Bridge Co. vs. Mayor and Ald. of Clarksville*, 176.

See INTEREST. CHARTER.

## FREEDOM.

4. *Bequest of.* A bequest of freedom is a distinct and substantive thing, which no power but that of the State can question. *Boon vs. Lancaster*, next friend, &c., 578.

FREIGHT, *pro rata*.

3. *When pro rata freight is due.* Freight is due *pro rata itineris* when the vessel by inevitable necessity is forced into a port short of her destination, and is unable to prosecute her voyage further, and the cargo is there voluntarily accepted by the owner. The consent of the owner to accept the cargo at such intermediate port, must either by word or act, be expressly given or fairly deducible, and when so



**FREIGHT, *pro rata*—Continued.**

given, the original contract is dissolved, and the claim to such *pro rata* freight rests upon the basis of a new contract, which the law implies. *Crawford vs. Williams*, 206.

**FUGITIVE SLAVES.**

See JURISDICTION OF STATE COURTS.

**GARNISHMENT.**

3. *Judgment in the Circuit Court. Jurisdiction of Justice of the Peace.* A judgment in the circuit court cannot be reached by a garnishment before a justice of the peace. *Clodfelter vs. Cox*, adm'r., et al., 330.

**GIFT.**

1. *Of a chattel by parol. Delivery.* A parol gift of a chattel, or *chose in action*, whether it be a gift *inter vivos* or *causa mortis*, does not pass the title to the donee without delivery and transfer of the possession. The effect of a valid delivery is to place the subject of the gift under the control and dominion of the donee, and his title and right of possession by such gift and delivery become absolute and irrevocable. Such delivery must be according to the nature of the thing, as the actual delivery of a sum of money, the delivery of the key of a trunk, of a room, and the like. *McEwen*, adm'r., vs. *Troost* et al., 186.
2. *Of a chattel by deed. Same. Delivery of the deed.* The gift of a chattel by deed is valid at the common law though there be no actual delivery of the thing given. Its execution is a deliberate act, indicating the purpose of the donor as clearly as if there had been an actual delivery of the subject of the gift. Nor can inconvenience result from the practical operation of such a rule, as by our law the deed of gift is required to be registered, by which notice of the gift is given to creditors and purchasers. Delivery of the deed is essential to its execution, but it need not be formal and manual, if the intention to deliver and accept the deed manifestly appear. *Ib.*  
See SLAVE.

**GRANT.**

See LAND LAW.

**GUARANTY.**

1. *Notice to guarantor.* An absolute present guaranty, complete in its terms, and fixing the liability of the guarantor, takes effect from the moment it is acted on by the guarantee; and no notice to the guarantor of the acceptance on the part of the guarantee is necessary to fix the liability. Thus, where on a written contract of general agency for the sale of books, the agent contracts for a consideration stated therein, to sell said books and pay to the principal his proportion of the proceeds of such sale, and the guarantors execute thereon their guaranty in these words: "We guaranty to — [the principal] that the above named — [the agent] will well and truly perform all his above and foregoing undertakings pursuant to the tenor and effect of the said contract;" such guarantors are not entitled to notice of

GUARANTY—*Continued.*

the acceptance of said guaranty, but were bound in default of said agent, for all the books delivered to him under said contract according to the tenor thereof, from the time said principal began to act upon such guaranty, and continued so bound until notice to said principal that they would be no longer bound. *Bright vs. McKnight et al.*, 158.

2. *Rule of construction and reason of the rule.* The rule of law governing the construction of undertakings in the nature of a guaranty, is, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit. The observance of this rule is important to the trade and enterprise of the country, which in the main, depend upon a combination of the labor and energy of those who have not means, with the credit of those who have; and the more difficult it is rendered by complicated rules to make these instruments available, the less confidence will be reposed in them, and the credit and encouragement they afford to enterprise and industry, will be, in a great degree, withdrawn. There is no hardship in such doctrine, as it is in the power of the guarantors to make their obligation dependent upon any condition they see proper. *Ib.*, 159.

## GUARDIAN AND WARD.

1. *Act of 1827, ch. 61. Administrator.* By the act of 1827, ch. 61, the titles to slaves belonging to the estates of persons dying intestate, passes to the distributees, subject to the claims of the administrator to pay debts. It is his duty to take charge of them, and if there be no debts, to distribute them. If there be no administration, and the distributees be infants, it is the duty of their guardian to take charge of the slaves and hire them out, and in so doing he is not a wrong-doer, but holds them rightfully. *Savage vs. Hale & Coggin*, 365.
2. *Rights and liabilities of guardian.* Where a guardian in the absence of administration, takes charge of the slaves of his ward, and by his negligence one of the slaves is lost, an administrator appointed afterwards, cannot recover the value of said slave in an action against said guardian. The liability of such guardian is to his ward alone. In such case the right of the administrator to recover against the guardian, would only extend to slaves of the estate then living, and which he could show were necessary for the payment of debts. *Ib.*

## HIGHWAY.

1. *Dedication. Right of way.* The mere license of the owner to the inhabitants of a local neighborhood, to use a pathway through his close, at sufferance, as a matter of favor and convenience, does not operate as a dedication of the way to the public use. The doctrine that a right of way may be claimed by a dedication to the public use by the owner of the soil, must be cautiously admitted, as its too easy application would defeat the right of the owner of the soil to have compensation for the damages sustained by laying out a road over his land, to which he is entitled, where such road is laid out by the proper authority. *Worth vs. Dawson & Fowler*, 59.

## HIGHWAY—Continued.

1. *Express dedication of easement by the owner of the fee. Time.* Where one lays out a street or way over his land for the general public, and it be accepted and used by the public in the manner intended, that is a good dedication of the easement, and no deed of writing is necessary to make it valid; nor does the right to such easement depend upon its use by the public for any *definite* time. But even in such case, it ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. *Scott vs. The State*, 629.
2. *Where the dedication by the owner of the fee is implied only. Same.* Where the right to the easement rests upon circumstances merely, from which the consent of the owner is to be inferred, time becomes a material element in the question of dedication. It may be without the owner's consent, or against his will, or merely temporary. The use of a way is not, in itself, proof of dedication. But if the *user* be for a length of time, that is a circumstance tending to show the owner's consent, and the fact of a dedication; but it is not conclusive, as it may be explained. *Ib.*
3. *When a dedication is claimed under one of several tenants in common, without the concurrence of the others.* The dedication of a highway to the public use, must be by the owner of the soil. One of several tenants in common cannot make a valid dedication without the consent of his co-tenants, either express or implied. *Ib.*

## HOMICIDE.

1. *Malice.* Malice cannot be inferred from the deadly intent merely, for that may exist in a case of self-defense, as where one from evident necessity wilfully kills another to save his own life; much less can malice be interred where the intent to kill was produced by anger; for if that were sudden and upon reasonable provocation, the killing would not be murder. *Quarles vs. The State*, 407.
2. *Intention.* Where one person kills another the presumption arises that the intention accorded with the act; but if the intention and act were the result of impulse and passion, excited upon sudden and adequate provocation, the idea of malice is repelled, and the killing is only manslaughter. We are not to suppose that a person thus excited is deprived of all reason, so as to be incapable of purpose or intention. That is not the state of mind. But being greatly excited upon a sufficient cause, he is impelled by a sudden motive of revenge to do the act, and that excludes the idea of malice. *Ib.*
3. A prisoner arraigned on a charge of murder is entitled to a correct and distinct exposition of the law as to the several grades of offence involved in said charge, and it is not always safe to speculate as to the effect of an error in this respect, or to assume that the prisoner was not injured thereby. *Ib.*

See CRIMINAL LAW.

## HUSBAND AND WIFE.

1. *Deed to the wife in exclusion of the marital right.* A deed of gift to a *feme covert*, "to the only proper use and behoof" of the said

HUSBAND AND WIFE—*Continued.*

*feme covert*, "her heirs and assigns forever," is wholly insufficient to create a trust for the separate use of said *feme covert*. The words are inappropriate to such a purpose, and from their use no such intention in the donor can be inferred. *Houston vs. Embry*, 480.

2. *Technical words. Intention.* Although technical words are not necessary to create a trust for the separate use of a *feme covert*, yet, it is indispensable that the intention to create such a trust shall be clearly manifested, otherwise the marital rights of the husband will not be affected. *Ib.*

See EVIDENCE.

## IGNORANCE OF LAW.

2. *Application of the principle.* The maxim that ignorance of the law is no excuse for the breach or non-performance of any agreement, only applies to the general or public laws of the land, which affect and prescribe a universal rule of action for the whole community; and has no application to special or private acts of the legislature, which are designed only to operate upon particular persons, or to regulate private concerns. *Cook & Steadman vs. The Sumner Spinning and Manufacturing Co.*, 898.

## II. ILLEGAL VOTING.

2. *Indictment.* In an indictment for the offence of illegal voting, a mere averment that the defendant voted in an election held under the constitution and laws of Tennessee, for President and Vice President of the United States, on the day and in the county named, "he, the defendant not being then and there a qualified voter in said county," is not a description of the offence. As there are, under the constitution and laws of Tennessee, various grounds of disqualification, the precise facts which disqualify the voter, must be stated. *Pearce vs. The State*, 63.

## II. ILLEGAL CONTRACT.

2. *Subsequent promise based upon or growing out of the same.* A new contract may be created, which, if wholly unconnected with the illegal transaction, and founded on a new consideration, will be valid, although in relation to a matter respecting which there may have been prior unlawful transactions between the parties; but if such contract, though it purports to be new, grows immediately out of, or be connected with the illegal transaction, it will be utterly void. *Bates vs. Watson*, 876.
3. *Same. Moral obligation.* Where a party had loaned money to be bet on an election, and upon which the loanee accordingly bet upon such election, and afterwards promised to repay the same, and the loanor brings his action upon the subsequent promise, to recover the same, it is not sufficient to prove such promise; but it must be shown that it was based upon a new and sufficient consideration. It is now well established that a moral obligation is not a sufficient consideration to support such promise. *Ib.*

## INDEMNITY.

See CONTRACT.

## INDICTMENT.

2. *Verdict of guilty upon two or more counts, where one is bad.* When the verdict is general, or upon two or more counts, and either count be good, the conviction will stand, no matter how defective the other count or counts may be. *Isham vs. The State*, 111.
  1. *Larceny. Description of bank notes.* A description of bank notes in an indictment for larceny, as one bank bill on the Bank of Tennessee, of the denomination of ten dollars, and of the value of ten dollars; and one bank bill on the Planters' Bank in Tennessee, of the denomination of ten dollars, and of the value of ten dollars, is a sufficient description. *Baldwin vs. The State*, 411.
- See ATTORNEY GENERAL. CRIMINAL LAW. ILLEGAL VOTING.

## INFANT.

See DOWER. WILL.

## INNOCENT PURCHASER.

4. To entitle a defendant in a suit against him to recover property purchased by him, to the protection extended to an innocent purchaser, his plea or answer must deny notice of the claimant's title previous to the execution of the deed and payment of the purchase money; and when the fact is within the defendant's own knowledge, notice must be denied positively, fully and precisely, even though it be not charged on the other side; and the notice so denied, must be notice of the existence of the claimant's rights, and not merely notice of the title papers evidencing such rights. *Aikin et al. vs. Smith*, 305.

## IN FORMA PAUPERIS.

See ACTION.

## INSOLVENT ESTATES.

1. *Acts of 1833, ch. 36, § 4—and 1852, ch. 283, § 12. Debts and arrearages due to the State.* By the acts of 1833, ch. 36—and 1852, ch. 283, providing for the administration of insolvent estates, priority of payment is required as to certain debts, and among others, debts and arrearages due to the State, by which is meant debts and arrearages due the Government or State in its sovereign character, as revenue, fines, forfeitures, penalties, and the like. They have no reference to debts due to a corporation created for banking purposes, although the whole interest in such corporation may be in the State. *Field's, ex'r, vs. The Creditors of Wheatley*, 351.
2. The statutes regulating the administration of insolvent estates, were not intended, and cannot be construed to affect, in the remotest degree, liens acquired in the lifetime of the deceased insolvent. They contemplate only a ratable division of the assets, which, by law, are subject to the satisfaction of the general creditors. *Id.*

## INSURANCE.

1. *Assignment of policy.* The title of the subject of the policy remaining in the assignor. Although a policy of insurance is not negotiable, and the

INSURANCE—*Continued.*

assignment of it does not pass the *legal* title to the assignee, yet it is a *chose in action*, assignable in equity, and this equitable interest will be recognised and protected as in other cases where *chooses in action* are assigned. But such assignment will be of no value to the assignee, unless the subject insured, or an interest therein, be also assigned. *Hobbs & Henly, use &c., vs. Memphis Ins. Co., 444.*

2. *Action upon assigned policy.* The action at common law upon a policy of insurance in the hands of an assignee, can only be maintained in the name of the legal owner, (the assignor,) for the use of the equitable owner, (the assignee,) and the insurer will be entitled to all defenses, as set-off, or otherwise, that exist in his favor against the original assured. *Ib.*
3. *Sale of the subject of the policy. As affecting the policy.* A sale of the subject insured, does not operate as an assignment of the policy. So, if the subject insured be assigned, and not the policy also, and a loss happen, neither the original assured or the assignee of the property, can recover indemnity of the underwriters. *Ib.*
4. *Same. Same.* If the party assured under a policy which contains a provision that it shall become void by assignment, without the consent of the underwriters, make a voluntary assignment of his entire interest in the *property insured*, he cannot, without such consent, also assign the policy so as to continue the risk upon the underwriters; but the risk will cease, unless the property insured be re-assigned during the time limited for the continuance of the policy. *Ib., 445.*
5. *Effect of an assignment of part of the property insured. Illustration of the rule.* If a part only of the property insured be assigned, the risk will continue upon the insurers as to the residue. So, where two partners in trade took insurance upon their stock of goods, and during the continuance of said policy, one of said partners sold and assigned his interest in the stock of goods to the other, the risk continues as to the interest of the assignee in the goods which he owned at the time of the insurance, and he may recover in an action brought in the name of the firm, for his use and loss of his original interest, but not for a loss to the interest of his co-partner so assigned to him, for that has ceased to be covered by the policy. *Ib., 445.*

## INTEREST.

3. *Constitution, art. 11, § 6. Act 1835, ch. 50, § 3. Franchise.* By the constitution of 1834, it is provided that the legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State; and the act of 1835, ch. 50, § 3, in pursuance thereof, fixes the legal rate of interest at six per cent per annum, and at that rate for a longer or shorter period. It seems, therefore, that no grant of a franchise subsequently made, can have a legal existence in this State, which allows the taking of a greater rate of interest than such as is fixed by the general law. *Hazen vs. The Union Bank of Tennessee, 115.*

SEE CONSTITUTIONAL LAW. PARTNERSHIP.

## INUENDO.

See SLANDER.

## INTERPLEADER.

See CHANCERY.

## INTERLOCUTORY DECREE.

See DECREE.

## INTERPRETATION.

3. "*Free State*." In a bequest for freedom, under the condition or direction of transportation to a free State, a broader meaning might well be given to those words than to confine their sense to the free States of this Union. *Boon vs. Lancaster*, next friend, &c., 578.

## INTENTION.

See CONTRACT. EVIDENCE. HOMICIDE. HUSBAND AND WIFE. WILL.

## JURISDICTION OF STATE COURTS.

2. *When fugitive delivered to claimant under act of Congress of 1793.* When a proceeding, regular in form, has been instituted under the act of Congress of 1793, in the Federal court, to recover a fugitive from labor escaping into this, from another State, and said fugitive has, by the order of said court, been delivered up to the claimant, with the certificate required by said act, the judicial tribunals of this State have no jurisdiction to entertain a suit for the purpose of trying the right of said fugitive to freedom. *Sidney, a man of color, vs. Thomas & Newton White*, 91.

## JURISDICTION.

See COUNTY COURT. EMANCIPATION. SETT-OFF.

## JOINDER.

See PLEADING.

## JUDICIAL DECISIONS.

7. *What part of an opinion is authority.* The reasoning, illustrations, or references contained in a judicial opinion, are not authority, but only the *points in judgment*, arising in the particular case before the court. The generality of the language used in an opinion, is, therefore, always to be restricted to the case before the court, and is only authority to that extent. *Louisville & Nashville R. R. Co. vs. The County Court of Davidson*, et al., 638.

## JUDGMENT.

See ASSIGNMENT. GARNISHMENT.

## JURY.

See ACTION. CRIMINAL LAW. NEW TRIAL. SETT-OFF.

## JUSTICE OF THE PEACE.

See GARNISHMENT. SETT-OFF.

## LAND LAW.

1. *Jurisdiction of courts of law. Void grant. Evidence to impeach. Conflict of entry.* It is well settled in this State that a court of law may, in some cases, declare a grant to be void for causes antecedent to and

## LAND LAW—Continued.

*dehors* the grant. So, where on a trial of title, the plaintiff produced his grant, founded upon an entry, and the defendant relied upon a younger grant, founded upon an older entry: *Held*, that as the defendant's title depended upon his entry, and he produced it himself to defeat the plaintiff's *prima facie* superior title, he thereby exposes it to scrutiny and impeachment, for any legal cause, and to assail it under such circumstances was no violation of principle or departure from authority. *Roach vs. Boyd*, 134.

2. *Void entry.* An entry made in an office which is vacant, and the entry received and recorded by a person who had access to the books, but no color of right or authority to exercise the functions of the office, is a nullity, and a grant based thereon communicates no title. *Ib.*, 135.
1. *Conflict of entry and grant.* *Act of 1823, ch. 35.* In order to preserve the advantages of priority of entry, the same must have been made, and the grant obtained in the specified time prescribed in the act of 1823, ch. 35, or within some period of extension. These are conditions imposed by the State, and must be complied with by all who set up claim to her lands. In case of failure to conform to these conditions, the entry is voidable, the claim forfeited, and the land subject to a younger enterer. The legislature, by a subsequent extension of the time for the performance of the conditions, cannot affect the title that has vested in such younger enterer. *Vide 5 Yerg.*, 236. 11 *Humph.*, 265. *Sampson vs. Taylor*, 600.  
See ESCHEATS.

## LARCENY.

See EVIDENCE. INDICTMENT.

## LIEN.

See PROPERTY. LIMITATIONS.

## LEASE.

See CONTRACT.

## LEGISLATURE.

See CONTRACT.

## LIABILITY OF R. R. COMPANIES.

See RIGHT OF WAY. CARRIER.

## LIFE ESTATE.

See REMAINDER.

LIMITATIONS, *Statute of.*

2. *Demands founded on record.* Debts and demands based upon any specialty, as a statute, bond or record, are not, in general, affected by the Statute of Limitations. 21 *Jas.*, 1, C. 16. But the record on which such demand is founded must be valid in itself. So, where a defendant in an action of debt produced the record of the county court, from which it appeared that the county court, more than six years before, had adjudged the plaintiff indebted to him a sum of money as damages for a private way through the lands of defendant, and from which it appeared also that he and the plaintiff had agreed upon said



LIMITATIONS, *Statute of—Continued.*

sum as the amount to be paid for said private way, and claimed that said record demand be set off against the demand of the plaintiff: *Held*, that as the county court had no power to make such order, said agreement must be considered as a simple contract, and therefore barred by the statute of limitations. *Rice vs. Alley*, assignee of Thos. Calloway, 52.

1. *Seven years' possession by judgment debtor, holding at the time of sheriff's sale. Offer to redeem. Act of 1819, ch. 28, § 2.* A mere offer to redeem, or to purchase in the outstanding title to land sold at execution sale, made by the judgment debtor suffered to remain in possession, after his possessory right has been acquired and perfected by operation of § 2, of the act of 1819, ch. 28, will not destroy the possessory right which had previously ripened into a fixed legal title. *Thomasson's lessee vs. Keaton*, 155.
1. *Actions on the case for libel.* An action on the case for libel, is, by the statute of limitations of Tennessee, barred after three years from the publication of said libel. *Brownlow vs. Jones*, 170.
2. *Statute of, as applied to trust estates.* When the statute of limitations begins to run, its operation cannot be arrested or suspended otherwise than by a suit in law or equity successfully prosecuted. So the death of a trustee, in whom alone is the right to sue, after the statute of limitations has commenced to run against him, and before the purposes of the trust are accomplished, and the failure to have a successor appointed before the lapse of time prescribed in the statute, can have no effect in preventing the bar of the statute. *Wooldridge et al. vs. The Planter's Bank et al.*, 297.
3. *Same. Cestui que trust.* It is well settled, that if a trustee having the legal title, is barred by the statute of limitations, the *cestui que trust* is also barred though an infant. Vide 8 Humph., 563. *Ib.*
2. *Debt barred by. What kind of promise will remove the bar.* A promise to have the effect to revive a debt barred by the statute of limitations, need not admit that a specific sum is due, but there must be a promise to pay something, or an acknowledgment that something is due in reference to a particular subject matter. If there be no express promise, but a promise to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. *Bell vs. Morrison*, 1 Peters, 382. *Brodie vs. Johnson*, 464.
3. An agreement to submit the matters in dispute to a third party, and to pay whatever such third party may find to be due, is not such a promise as will make the party liable for a debt barred by the statute of limitations. *Ib.*
4. *Conditional promise. Example.* To say "If I owe you any thing I will pay you," or "I do not owe you any thing, but I will refer the matter to A B, and if he says I owe you, I will pay," does not revive a debt, if one in fact did exist, because the promise, or acknowledged-

LIMITATIONS, *Statute of—Continued.*

ment is conditional, not only as to the amount, but as to any indebtedness at all. But to say, "I admit I am indebted to you," in reference to a certain matter, "but not to the extent you claim, and will leave it to A B, and will pay the amount thus ascertained," would be sufficient. *Ib.*

1. *Administrators and executors. Act of 1789, ch. 23, § 4.* A request made by an administrator or executor of a creditor for indulgence and delay until said representative can collect the debts of the estate, or until he can collect money, is a *special request*, and for a sufficiently definite time, within the meaning of the proviso to the act of 1789, ch. 23, § 4, to obviate the statute of limitations created by said act. *McKissack & Co. vs. Smith*, 470.
1. *Seven years' possession of land under title bond. Vendor's lien for unpaid purchase money. Act of 1819, ch. 28, § 2.* A possession of seven years by the vendee of land, claiming by virtue of his purchase, as evidenced by the bond for title under which he holds, gives him a right of possession that cannot be disturbed by the vendor by a bill to enforce his lien for unpaid purchase money which has been due above seven years. Such lien is barred by § 2 of the act of 1819, ch. 28. *Ray et al. vs. Goodman*, 586.  
See ESCHEATS. REMAINDER. TENANTS IN COMMON.

## LOAN.

3. *Rule as to loans at common law.* The rule of the civil law as to the distinction between precarious and definite loans does not obtain at common law. All pure loans, whether for a definite or indefinite period, are, at common law, generally regarded as tenancies at will, and subject to be revoked at any time by the will of the loanor, or their character subject to be changed by marriage in the case of a female loanee, if accompanied with a sufficient subsequent adverse holding on the part of her husband, which is known to the loanor. *Hallum vs. Yourie*, 369.

## LOST INSTRUMENT.

1. *Secondary evidence as to contents of.* Secondary evidence as to the contents of a lost note, in a suit to recover the amount, cannot be heard until its non-production is accounted for by the person last having the legal custody thereof. It is the province of the judge, not the jury, to determine from the proof, whether there is a reasonable presumption that the paper has been lost. *Tyros vs. Magness*, 276.

## LUNACY.

See APPEAL.

## MALICIOUS PROSECUTION.

1. *Evidence. Character of, required in defence.* In an action of malicious prosecution, the defendant is only required to show that at the time he instituted the prosecution he acted upon such a state of facts known to him, or derived from reliable information, as would induce a belief in the mind of a prudent, discreet man, that the crime had been com-

**MALICIOUS PROSECUTION—Continued.**

- mitted, and by the man he was about to prosecute ; and this belief may be based purely upon circumstantial evidence, both as to the *corpus delicti* and the probable guilt of the party accused. *Raulston vs. Jackson*, 128.
2. *Same.* The question in an action for malicious prosecution is not, whether the plaintiff in such action be really guilty of the crime alleged against him, but whether reasonable grounds existed for the defendant to believe him so. It might often turn out that no crime had, indeed, been committed, and yet the prosecutor be justifiable, because of the existence of reasonable grounds to believe that the crime had been committed, and that the party accused was the guilty agent. *Id.*
  3. *What is prima facie evidence of a want of probable cause.* When a peace warrant is taken out, and the defendant arrested, and upon an examination of the facts by the magistrate they are deemed insufficient, and the defendant is discharged, such discharge would be *prima facie* evidence of the want of probable cause for said prosecution, and where coupled with malice would sustain an action for malicious prosecution, unless rebutted successfully by proof that there was reasonable ground for the apprehension of damage to person or property on which the proceeding was instituted. But where the magistrate, on investigation of the facts, binds the defendant to appear at court, and the prosecutor merely fails to appear and ask that he be re-bound, and the defendant is thereupon discharged ; this is not such an acquittal as is contemplated in the rule, and raises no such presumption of the want of probable cause. *Pharis vs. Lambert*, 228.
  4. *What necessary to authorize the action.* In order to authorize an action for malicious prosecution, it must appear : 1, that the prosecution is ended ; 2, that there has been an acquittal or final discharge ; 3, that the charge was made through malice, and without reasonable or probable grounds to believe it true. Malice may be inferred from the want of any reasonable grounds for the prosecution, as the circumstances appeared to the prosecutor, or as they would have appeared by ordinary circumspection and diligence on his part at the time he acted. *Id.*

**MALICE.**

See HOMICIDE.

**MANDATARY.**

See BAILLEE.

**MARITAL RIGHTS.**

See TRUST. HUSBAND AND WIFE.

**MECHANIC'S LIEN.**

1. *Repairs upon mortgaged property, made after mortgage registered, on the credit of mortgagor.* A mortgagee is entitled to priority of payment over the lien of a mechanic for work done and materials furnished at the request and on the credit of the mortgagor, after notice of the existence of the prior lien ; and the registry of the mortgage is sufficient notice thereof. *Reid, adm'r., vs. The Bank of Tennessee, et al.*, 262.

## MISJOINDER.

See PLEADING.

## MORAL OBLIGATION.

See ILLEGAL CONTRACT.

## MOTION.

1. *Sheriff. Notice waived by appearance.* In the remedy by motion, the notice is not the commencement of the suit, nor is it a judicial process, but the individual act of the party required by the statute for the benefit of the party to be moved against, that he may have an opportunity to contest the motion. But if he should appear without it the only purpose of the notice is answered, and he cannot defeat the proceeding on the ground that he had no notice. *Watkins vs. Barnes*, 201.
2. *For non-return of execution.* A motion made against an officer for failing to return an execution, cannot be sustained by showing an insufficient or false return. *Ib.*
3. *Statutes authorizing, to be strictly pursued.* The remedy by motion is a proceeding unknown at common law, which deprives the party of a jury trial, and is therefore liable to great abuse, and must be strictly pursued. The motion is the commencement of the suit, and the record must show distinctly the particular ground upon which it is made, and upon that the judgment to be valid must be rested. If that is not sustained the motion fails. *Ib.*
1. *Judgment by, against the principal on behalf of surety.* It is a settled rule, that the remedy by motion must be strictly pursued, and confined to the very cases stated by the statute which gives it. So, on motion by a surety against his principal, under the act of 1809, ch. 69, for the amount of such judgment as may have been rendered against him as surety, where there are two or more principals, all must be embraced in such motion or judgment. Separate judgments cannot be rendered against each in favor of the surety who has made no payments on the judgment rendered against him. *Voorhies vs. Dickson*, 348.
1. *Against sheriff for false return. What is a false return in a legal sense.* Act of 1835, ch. 19, § 6. The words "false or insufficient return," as used in our act of 1835, ch. 19, § 6, authorizing the proceeding by motion, have reference alone to the *face of the return*, and in the determination of the question as to whether the return be false or insufficient in the proceeding by motion, nothing extrinsic of the return can be looked to. The inquiry is, is it such in point of law. *Fussell vs. Greenfield*, 437.
2. *The statutes authorizing the remedy by motion to be strictly construed. Extrinsic evidence of falsity of return.* The provisions of the statutes authorizing the summary remedy by motion against an officer for a false or insufficient return, are cogent and rigorous, and they are not to be extended in their operation beyond what appears to have been the clear intention of the legislature. So, in a proceeding by motion for a false return, it is not admissible to show by extrinsic evidence, that such return is false in point of fact. For such purpose the party must resort to his common law remedy of an action on the case. *Ib.*  
See CERTIORARI.

## NEW TRIAL.

2. *Juror.* A prisoner has a right to a fair and impartial jury, none of whom have prejudged his case; and although loose impressions or conversations of a juror, if disclosed by him, or others, to the court, will not have the effect to set him aside as incompetent, yet, if it be shown after conviction, that any one of the jurors had, before the trial, expressed an opinion seemingly well grounded, as to the guilt of the prisoner, he is entitled to a new trial. So, where a juror, when presented and tried *quoad affectum*, may be apparently competent; and after conviction it was shown that said juror, before he was taken on said jury, had been heard to say in reference to the prisoner, "damn him, he ought to be hung;" *Held*, that such statement, being made in the strongest terms of opinion, conviction and prejudice, said juror stood convicted of having prejudged the case, and the prisoner is entitled to a new trial. *Brakefield vs. The State*, 215.
3. *Counter affidavits.* It is well settled that the affidavit of an offending juror cannot be heard to exculpate himself and prejudice the prisoner; nor is it competent to receive the affidavits of other jurors to the effect that the offending juror was favorable to the prisoner on the trial. The issue is, was the juror competent; not what his conduct was after he was taken upon the jury. If he was put to the prisoner as a competent juror, when in fact he was incompetent, the rights of the prisoner were violated, and it is a legal presumption that he was injured. *Id.*
3. *Evidence.* If in an action for damages for breach of a specific contract, evidence objected to by the defendant is permitted to go to the jury as to damages of a nature too remote, uncertain and speculative, to form a just and proper measure of the recompense to which the plaintiff is entitled, and the jury render a verdict against the defendant, a new trial will be granted. *Walker & Langford vs. Ellis & Moore*, 515.

## NOTES WON AT GAMING.

1. *In the hands of assignee with notice.* A party losing notes at any unlawful game may recover the same, or their value, in the hands of the assignee of the winner, who has notice of the defect in the winner's title, if the action be brought within ninety days from the time of such loss. *Revier vs. Hill*, 405.

## NON-ASSUMPSIT.

See PLEADING.

## NON-RESIDENTS.

See ACTION.

## NOTICE.

See DOWER. GUARANTY. MOTION. ASSIGNMENT

## NUNCIATION.

See WILL.

## OATH.

See SHERIFF.

## ORDER PRO CONFESSO.

See DOWER.

## PAYMENT.

1. *Acceptance by creditor of a bill or note of a third person in payment.* Proof of the acceptance by the creditor, of a promissory note or bill of a third person, if it appear to be the voluntary act and choice of the creditor, and not a measure forced upon him by necessity when nothing else could be obtained, will support the defense of payment. *Union Bank of Tennessee vs. Smiser*, 501.
2. *Same. Certificate of deposit.* Where a creditor having the option of taking cash elects to take a bill, which is dishonored, the original debtor is thereby discharged. So, where an agent having a note to collect voluntarily receives from the debtor, without his guaranty or assignment, a certificate of deposit in payment thereof, which was good and available at the time, and said certificate is afterwards protested for non-payment, the amount of said certificate cannot be recovered from said debtor. *Id.*
3. *Same. Evidence.* When a creditor takes notes from his debtor in payment of the debt, and omits to require his endorsement thereon, such omission is *prima facie* evidence of an agreement to take the notes at his own risk. And whether a security was accepted in satisfaction of the original claim, is a question of fact for the jury. *Id.*

## PARTNERSHIP.

4. *Evidence. Interest.* Although a partner in an action against the firm, may be examined to prove the justice of a debt, after the partnership is proved *aliunde*, yet he cannot be heard on a question of the existence of the partnership, for, by establishing the partnership in favor of the plaintiff, he onerates his co partner with the debt, and exonerates himself to that extent, as he would be only liable over to his co-partner as between themselves, for one half. *Vanzandt vs. Kay et al.*, 2 Humph., 112. *Yancey vs. Marriott, Frisby & Co.*, 28.
1. *One partner using firm's name in a contract without the scope of the partnership business. Evidence of assent.* Where a partner uses the name of the firm in a transaction without the limits of the partnership business, the fact that the other partner remains silent, or fails to dissent from the contract, while it would be a circumstance proper to go to the jury, tending to prove assent, previous or subsequent, yet it would not be conclusive as fixing his liability as a matter of law. *Ferguson vs. Shepherd & Gordon*, 254.

## PERSONAL SERVICE.

See CONTRACT.

## PLEADING.

2. *Abatement. After plea in bar.* When an action is instituted in a county where one of several defendants resides, and counterparts issued to other counties and served upon other defendants resident therein, and before trial a *nolle prosequi* is entered as to the original defendant, it is matter in abatement, and may be taken advantage of after a plea in bar, by plea in abatement, but not by motion to dismiss. *Yancey vs. Marriott, Frisby & Co.*, 28.

PLEADING—*Continued.*

3. *Same.* After a plea in bar the defendant cannot in general plead in abatement, but it is otherwise when the matter in abatement arises after the plea in bar. *Ib.*
3. *Suit for freedom. Demurrer.* Where a suit was instituted in this State, by a man of color, to recover his freedom, against parties who claimed him as a fugitive slave from another State, and the defendants, after issue joined on the plea of not guilty, plead specially that the plaintiff had been taken by them prior to the institution of his suit in a proceeding regular in form, under the act of Congress of 1793, before a judge of the United States Court, by whom they had been adjudged entitled to the possession of said plaintiff as a fugitive slave, and that they had received from said judge a certificate to that effect, as required under said act of Congress; to which plea the plaintiff replied that such proceeding was *ex parte* and in fraud of his rights; *Held*, that said plea goes to the entire cause of action alleged in the declaration, and being valid, is a bar to the action, and the replication was demurrable; and upon a *demurrer* to such replication final judgment in favor of defendant was proper. *Sidney*, a man of color, vs. *White*, 91.
4. *Joinder by plaintiffs in action of covenant.* When a covenant to indemnify against the payment of a debt, is made to two or more persons jointly, all must join in an action upon it, and the failure to join would defeat the action, although they may have severally paid the debt, and out of their separate funds in equal or unequal proportions. *McNairy vs. Thompson*, et al., 142.
1. *Non-assumpsit.* While it is true that upon a plea of non-assumpsit not verified by affidavit, the maker of a note cannot deny the execution, nor the endorser his endorsement thereof; yet upon such plea without oath, either is at liberty to urge if the fact be so, that from the plaintiff's own showing upon the face of the declaration, he has no legal interest in the note, and consequently can maintain no suit thereon. *Eakin & Co. vs. Burger* et al., 417.
2. *Misjoinder of parties. Statute of jeofails of 1852, ch. 152.* The act of 1852, ch. 152, authorizing amendments in pleading, and the striking out and supplying parties to an action does not extend to cases where suit is brought against the maker and endorsers of a negotiable instrument in the name of the holder to whom the legal title has not passed. *Ib.*
3. *Same. Same.* Where the holder of a negotiable note to whom the same had been transferred by the payee without endorsement, but with the guaranty of said payee written upon a separate piece of paper, brought an action of assumpsit in his own name against the maker, endorser, and guarantor, and in one count of his declaration set forth the guaranty and the precise liability of the guarantor: *Held*, that though he could not recover in said action against the maker and endorser, for want of legal title, yet by virtue of the act of 1852, ch. 152, he may recover in said action against said guarantor. *Ib.*
1. *Failure of consideration.* In an action by the payee of a bill single against the maker, given for the purchase money of a slave bought by

**PLEADING—Continued.**

the latter of the former with warranty of soundness, it is a good defense in bar of the plaintiff's action to plead that a fraud was practiced by the plaintiff upon the defendant in the sale of said slave, and that the same, at the time of said sale, was utterly worthless and of no value; and if the defendant make good his plea by proof, the plaintiff cannot recover. Act of 1850, ch. 60, § 1. *Franklin vs. Ezell*, 497.

**PRACTICE.**

1. *Appeal and writ of error. Chancery. Act of 1835, ch. 3, § 17.* It is the settled law of this State, that no appeal or writ of error lies from any interlocutory decree, except in the single case provided for in § 17 of the act of 1835, ch. 3, by which the court of chancery has discretion to allow an appeal after an account is ordered and before the same is taken, where by such decree the principles involved in the case are determined. The right to appeal or to prosecute a writ of error, in all other cases, depends upon the finality of the decree. So, where by a decree, the rights of all the parties litigant but one, were definitely settled, but no disposition made of the costs; and an account ordered as to the party excepted, with the subject matter of which account the other parties had no connection: *Held*, that this was no such final determination of the cause, as would authorize its removal by writ of error to the supreme court. *Delap et al. vs. Hunter et al.*, 101.
2. *As to depositions.* It is a settled rule of practice in the courts of Tennessee, that any judicial functionary competent to administer an oath in other States, is legally competent to take depositions, and that his statement in the caption or certificate that he sustains such office or character, is evidence *prima facie* of that fact. *Hoover vs. Rawlings*, 287.
4. *The remedy by certiorari.* In cases where no appeal or writ of error is given by statute, the writ of *certiorari* has been adopted in our practice as the almost universal method by which the circuit court, as a court of general jurisdiction, exercises control over all inferior jurisdictions, however constituted, and whatever their course of proceeding. *Cooper vs. Summers*, 453.  
See COSTS IN CIVIL CASES. CHANCERY.

**PRESUMPTION OF DEATH.**

4. *After seven years' absence.* The rule as to the presumption of the death of a person after seven years' absence, is, that such presumption of law does not attach unless it appear that such person has been absent from his domicile, or his last place of residence, without intelligence concerning him for the period of seven years. A jury, however, may find the fact of death if the circumstances concur, from the lapse of a shorter period than seven years. *Puckett vs. The State*, 356.

**PRESUMPTION.**

See GIFT. DELIVERY OF DEED.



## PRIVATE WAY.

1. *County Court. Constitutional law.* The county court has no power to compel a private person at whose instance a private way is opened through the lands of another, to pay damages for such private way. The consent of the parties cannot confer with such jurisdiction. The right of a private way can only exist by prescription or convention between the parties, and not by judicial compulsion. The act of 1811, ch. 60, which authorizes the construction of private ways, upon the petition of any person whose lands may be surrounded by the lands of another, upon petitioner's paying damages, is repugnant to the constitution, as violative of private right. Vide Con., art. 1, § 8, et 2 Yerg., 554-560. *Rice vs. Alley*, assignee of Thos. Calloway, 51.

## POWER OF APPOINTMENT.

2. *How exercised to be valid.* A power of appointment must be exercised in good faith for the benefit of those who are intended beneficiaries under it. If it appear that it has been exercised collusively, and for the benefit of the party exercising it, such exercise is a fraud upon the power and cannot be maintained. Thus, where a father has a power of appointment to either of his children he might choose, and being required to give bail for his appearance at court to answer a criminal charge, conveyed the estate to one of his sons in order to render said son a good and sufficient surety on his bail bond, who was to re-convey at the end of the prosecution, and the father afterwards sold the land, the son executing a deed to the purchaser, but receiving no part of the consideration therefor, such exercise of the power being for the father's own benefit, was therefore void. *Bostick et al. vs. Winton et al.*, 525.

## PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

## PROCESS.

2. *Sheriff.* When an execution issued by a court having jurisdiction of the subject, is regular and valid upon its face, the simple duty of the officer into whose hands it is placed, is to execute the writ, as by it he is commanded; he is neither bound or permitted to enquire after the judgment, for his office in this respect is ministerial only. *Mason vs. Vance*, 178.

## PROMISE.

See ILLEGAL CONTRACT.

## POSSESSION.

See EJECTMENT. TENANTS IN COMMON. TRESPASS.

## PROPERTY.

1. *In product of mechanic's labor. Accession. Lien.* Where the materials of A and B are united by the labor of B, who furnished the principal materials, the property of the joint product is in the latter by right of accession, the materials of the former being considered as only accessory; but where A furnished the principal materials and B does the work, furnishing a part of the materials of little value, the property in the product is vested in A, subject to B's right to com-

PROPERTY—*Continued.*

pensation for the making and for such materials as he furnished; for which he has a lien, and may retain possession until payment is made or tendered. *Dunn vs. Oneal*, 106.

2. *Same. Where title claimed by converting materials, and becoming liable for value.* One cannot convert to his own use the materials of another by changing its form and acquire title thereto on the ground that he is liable for their value. He can acquire no title by a wrongful act unless the owner see proper to abandon his property or accept a satisfaction in value. Whatever alteration of form any property has undergone the owner may seize it in its new shape, if he can prove the identity of the original materials. *Ib.*

## PURCHASER.

See EJECTMENT. CAVEAT EMPTOR.

## QUANTUM MERUIT.

See ACTION.

## RAILROAD CO.

See CARRIER. RIGHT OF WAY.

## RECOUPMENT.

See CONTRACT.

## RECORD.

See LIMITATIONS.

## REDEMPTION.

See LIMITATIONS. TENANTS IN COMMON.

## REMAINDER.

1. *When vested. Life estate settled upon trustee with directions to convey remainder at the falling in of the life estate.* Where a donor by deed, conveyed certain slaves to a trustee to the use and benefit of said donor's daughter during her life, and at her death to be conveyed to the children of said daughter, such trust estate continues no longer than is required by the purposes of the trust, and the legal effect of the deed is, to convey a vested remainder to the children, to take effect in possession at the death of the mother; on the happening of which event, they instantly became invested by operation of law with a legal estate and interest in the slaves. *Aikin et al. vs. Smith*, 304.
2. *Same. When a conveyance of remainder by trustee may be presumed.* Where the legal title has been vested in a trustee either in fee or for a limited term of years, a conveyance or surrender of the legal estate by the trustee, may, in some cases be presumed, and this presumption will be made equally in the case of a deed or will—as where it is the duty of a trustee to convey—where there is sufficient reason for the presumption, and where the object and effect of the presumption is to support a just title. *Ib.*
3. *Same. Same. Illustration of the rule. Limitation.* Where there is an express direction or provision in the trust instrument for a conveyance of the legal estate by the trustee, at a certain specified pe-

**REMAINDER—Continued.**

riod, the duty being more cogent, the presumption of conveyance will the more readily arise. Thus, where a trust estate in slaves was created in 1828, for the use and benefit of a tenant for life, in possession; remainder to be conveyed by said trustee to the children of said tenant for life, at the termination of said life estate; and the life estate ends in 1841, the children being all then minors, and the trustee dying in 1850, a bill is filed by the children in 1852, (some of whom were still under disability,) to recover said slaves, who had been sold by the tenant for life in 1833, to the defendant, who had notice of their claim, and who had held the slaves as his own ever since; a presumption arises in such case that the trustee surrendered the legal estate at the proper time, and the purchaser cannot protect himself under the statute of limitations by reason of the trustees' failure to sue within three years after the falling in of the life estate. [*As to the statute of limitations, CARUTHERS, J., dissented.*]. *Ib.*

2. *In chattel, dependent on life estate. Reserved by deed. Rule at common law.* By the rule at common law, a reservation in remainder of a chattel dependent on a life estate was admitted with much doubt and difficulty, even when created by deed or will, and this doctrine, it seems, has never been extended so as to embrace the case of a parol remainder. There is no difference on principle between the cases of a parol gift and a parol reservation of a remainder in a chattel; in neither case does possession follow the subject matter disposed of, and they are alike subject to the objection of a disjunction of the possession from the property, without written evidence fixing the title. *Hallum vs. Fourie*, 369.

See WILL.

**REMEDY.**

See SPECIFIC PERFORMANCE.

**REPLEVIN.**

1. *Estoppel. Defendant claiming by exchange or purchase from the vendor of the plaintiff.* The distinct and peculiar object of the action of replevin, is to recover in specie some personal chattel which has been taken and detained from the owner's possession, with damages for the detention. The plaintiff must prove either a general or special property in himself, and will be defeated if the proof shows the right of property and possession to be in a stranger. So where the plaintiff and defendant both claim under the same person, the plaintiff by purchase and the defendant by exchange, the defendant is not estopped by his relation to the party under whom both claim, to show that the title was not in said party but in a stranger, and if he succeeds in so doing, the plaintiff must be defeated. *McFerrin et al. vs. Perry*, 314.
1. *When the action does not lie.* The action of replevin cannot be maintained by a party for his goods taken by an officer under process of law, where such party is defendant in the process. It can only be

REFLEVIN—*Continued.*

maintained by a stranger to such process. *Vide Shaddon vs. Knott*, 2 Swan, 358. *Dearmon vs. Blackburn*, 390.  
See EVIDENCE.

## RES JUDICATA.

3. Where a suit is brought by an assignee of a note against the makers, who recover judgment against the assignee on the *merits*, upon a cause of defense that existed against the note before the assignment, and the assignor was notified of the defense so as to enable him to litigate the matter with the defendants, the assignor cannot, afterwards, by erasing the assignment, maintain a suit against the same parties on the note. In such case, the assignee succeeded to the interest in the assignor, and held in privity with him. *Tyree vs. Magness*, 276.
1. *Chancery*. Where a bill is filed to enjoin the collection of a judgment at law on the ground of usury, where the complainant had made his defense at law. *Act of 1850, ch. 53*. Since the passage of the act of 1850, ch. 53, authorizing discoveries in a court of law, a defendant sued to judgment in an action at law upon a contract which he alleges to be usurious, who has had the benefit of such defense in a court of law, can have no relief in a court of equity. By such proceeding at law the matter has become *res judicata*, and the court of chancery has no jurisdiction. *Bumpass vs. Reams*, 595.

## RETROSPECTIVE LAW

See STATUTE.

## RIGHT OF WAY.

See HIGHWAY.

## SALE.

See INSURANCE.

## SCIRE FACIAS.

See EXECUTOR.

## SECURITY AND ENDORSER.

1. *Act of 1843, ch. 32*. A security or endorser, cannot avail himself of the provisions of the act of 1843, ch. 32, unless the fact of his being such security or endorser, appears upon the face of the judgment and execution against him. If the provisions of said act are not complied with in this respect, all the defendants in an execution are to be treated as principals. *Vide 11 Humph.*, 445. *Grissom vs. Moore*, 361.

## SETT-OFF.

1. *Mutuality of demands. Jurisdiction*. The jurisdiction of the courts in cases of sett-off, depends upon the existence of mutual, adverse and actual demands, between the plaintiff and defendant. 1. They must be mutual, *i. e.*, for a sum certain, and of the same grade and nature. 2. They must be actual, subsisting debt, *i. e.*, there must be legal debts on both sides, found by the jury or justice, to be due at the time the judgment on the sett-off is rendered. So, when the claim of the plaintiff is wholly disallowed, the court or justice has no jurisdiction to

**SETT-OFF—Continued.**

render judgment in behalf of the defendant for the amount claimed as sett-off. *Eddington vs. Pickle*, 122.

2. *Justice of the peace. Act of 1815, ch. 53. Construction.* The act of 1815, ch. 53, which provides that it shall be lawful, when a suit is brought before a justice of the peace, and the defendant shall plead a sett-off, and on a fair examination of their accounts it shall appear that there is a balance due the defendant, to enter up judgment against the plaintiff for said *balance* due on the examination of conflicting accounts. The intention is, that when there are mutual demands, and the defendant's is the greater of the two, he shall not be forced to a cross action to recover such balance, but in *that* action he shall so far be regarded as plaintiff as to obtain a judgment for the amount so found to be due him, after the judgment of the plaintiff is extinguished. *Ib.*

**SHERIFF'S RETURN.**

3. *Parol proof to contradict.* After an official return has become the foundation of a title acquired under a levy and sale, it is not competent to admit parol proof of the officer to contradict his return, either to impeach or sustain the validity of a purchaser's title. *Pratt vs. Phillips*, 543.

**SHERIFF'S DEED.**

See EJECTMENT.

**SHERIFF'S SALE.**

See LIMITATIONS.

**SHERIFF.**

1. *Deputy can administer oaths where sheriff authorized by law to do so.* Where, by law, the sheriff, in the execution of a writ of *ad quod damnum*, is authorized to empanel and swear a jury, such acts being ministerial merely, may be performed by a deputy. *Stevens et al. vs. The Duck River Navigation Co.*, 237.

**SLAVE.**

1. *Action on a warranty of soundness. Measure of damages.* In an action upon a contract of warranty of soundness of a slave, the rule is, that the damages consist of the difference between the value of the property at the time and place of sale, if sound, and its value in its unsound state. To this may be added the expenses of keeping, nursing and medical attention, if it be shown that the vendee offered to restore the property before the expenses were incurred. If he fail to do this, he can only recover in a suit upon the contract, according to the foregoing rule. *McGavock vs. Wood et al.*, 181.
2. *Same. Same.* Where a slave is sold and purchased to be taken south or elsewhere, for sale or service, and after said journey an action is brought by the vendee against the vendor, upon his warranty of soundness, there is no rule which authorizes the plaintiff to recover in said action, the expenses of said slave in making said trip. *Ib.*
1. *Gift of life estate, reserving part by remainder. Act of 1831, ch. 90.* A valid estate in remainder in a slave could not be reserved in

SLAVE—*Continued.*

parol by the donor of the life estate, even before the passage of the act of 1831, ch. 90. Such an estate being invalid the whole interest would pass by the gift to the donee. *Hallum vs. Yourie*, 369.

## SLANDER.

1. *Evidence. Opinions of witnesses.* In an action of slander, where the declaration by proper averments, states the existence of certain extrinsic matter to explain the meaning and application of the words spoken, and show their defamatory character, such averments being substantive allegations of fact, must be proved; and in such case it is competent when the words are proven, to admit as evidence to the jury the understanding of witnesses familiar with such extrinsic facts, in whose presence the words are uttered, as to their application. Vide 1 Starkie on Slander, 44. 2 *Ib.*, 320, *Tompkins vs. Wisener*, 458.
2. *Same. Mere inference of witnesses as to application of words.* The mere general opinion of a witness derived from reading a libel, or hearing the words spoken, unaided by any circumstance within his knowledge, or accompanying the act, is not competent evidence. But his understanding as to the meaning of the words, and their application to the plaintiff when founded on facts previously known to him, and detailed by him as the foundation of such understanding, is not subject to such exception, and is competent to go to the jury, who may adopt or reject it as in their judgment it is well or ill-founded. *Ib.*
3. *Same. Illustration of the rule.* In actions of slander, it is the sense and application of the words spoken, as *understood by the hearers*, which caused the damage, and constitutes the very *gist* of the action. So, where the words spoken were, "there goes the grocery keeper who stole my money," and the witness saw no one passing at the moment except the plaintiff, and was aware (as he stated) of a difficulty which some time before occurred between the plaintiff and defendant, in which the plaintiff, who had kept grocery for the defendant, was charged by him with embezzling his money, it was competent to allow said witness to state his opinion as to the application of the words. *Ib.*
4. *Same. Imputation of crime by inuendo.* It is not absolutely essential in order to ground an action of slander, that the defamatory words should *carry on their face* an open and direct imputation of crime, as the nature of the imputation may, from extrinsic matter, be perfectly well understood by the hearers acquainted with the persons and circumstances. *Ib.*

## SPECIFIC PERFORMANCE.

2. *Breach of contract. Remedy.* It being a higher and more perfect remedy than the damages which a court of law may award for the breach, it is a matter of course, that a court of equity will decree a specific performance of a contract for the sale of real property, in the absence of any valid objection. As when the contract is in *writing*, signed by the party to be charged, for an adequate consideration, cer-

SPECIFIC PERFORMANCE—*Continued.*

tain in its terms, fair in all its parts, and capable of being performed. *Blair and Gillenwater, adm'rs, vs. Snodgrass and Lyon, et als., 1.* See CONTRACT.

## SPECIAL ADMINISTRATION.

1. *Power of the county courts to appoint.* The county courts of this State may grant letters of limited administration upon the estates of deceased persons. This power existed under the act of 1794, ch. 1, § 47, and is clearly created and defined as to the estates of non-resident decedents, by the acts of 1842, ch. 69 and 165. But such special administration does not prevent a grant of the general administration in a proper case, to a different person; and the two administrations may well subsist together. *Jordan vs. Polk., 430.*
2. *Rights of next of kin and creditors.* A limited administration, as contemplated by the laws of this State, is not within the letter or spirit of the law prescribing to whom the general administration shall be granted. The next of kin, or creditors, cannot claim a right to special administration, if occupying an antagonistic relation to those who represent the deceased. So, where the deceased, a non-resident, had no estate within the limits of this State, except the subject of a suit which he was prosecuting at the time of his death, against his brother, it was no error in the county court to refuse the general or special administration to such brother, and confer the special administration upon an indifferent person. *Ib.*

## STATE COMITY.

1. It is due to that comity which should be fostered among the several States of this Union, that the citizens of all should be free and unmolested in vindicating their rights in the courts of this State. Such has always been the policy of our legislation, and the spirit of judicial decision; and our courts will construe no statute, so as to place it in conflict with this principle, unless constrained to do so, by its express provisions, or by some rule of obvious and necessary policy, or fixed principle of international law. *Lisbee vs. Holt, 42.*

## STOCKHOLDER.

See CORPORATION.

## STATUTE.

1. *Retrospective law.* A retrospective law, in the proper sense of the constitution, is a law impairing the obligation of contracts or disturbing vested rights; and this doctrine is understood to have no application to laws which merely regulate the remedy or mode of procedure, as contradistinguished from the right. *Gardenhire vs. McCombs, et al., 83.* See AMENDMENT.

## STATUTE OF FRAUDS.

3. *The form of the instrument.* The form of an instrument purporting to be a contract for the sale of real estate, is not material, the statute of frauds merely requiring that the contract or some memorandum or note thereof, shall be in writing. Nor is it essential to its validity, that the whole should be comprised in a single document. If it can be clearly

STATUTE OF FRAUDS—*Continued.*

and plainly defined from any writings of the party, or even from his correspondence, it will suffice. But when several papers are relied upon as written evidence of a contract for the sale of land, these papers must contain *intrinsic* proof that they relate to the same contract; for, if the court cannot ascertain the terms of the same from *some other writing to which it refers*, with reasonable certainty, the writing does not take the case out of the statute. *Blair & Gillenwater, ad'mrs, vs. Snodgrass & Lyon et als., 1.*

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## STATUTE OF LIMITATIONS.

See LIMITATIONS.

## STAY OF EXECUTION.

1. *Liability of stayor.* The stay of execution is, in effect, a confession of judgment, and the stayor is liable under the law applicable to such judgment, and not otherwise. It cannot be for a part of the debt only, or for a greater or less term than that limited by law, or otherwise varied from the general rule. *Roberts vs. Cross*, 283.
2. *Same.* A conventional stay of an execution, which varies from the general law, is a mere contract, and not the final and conclusive judgment which the law contemplates. So, where a stayor consented to stay the whole debt for a shorter period than the eight months allowed

STAY OF EXECUTION—*Continued.*

by law, he incurred the obligation of stayor, but no execution can be issued against him until the full period of eight months has elapsed. *Ib.*

## SURETY.

See MOTION.

## TECHNICALITIES.

4. *In criminal prosecutions.* The day has passed when the guilty can be rescued upon mere technicalities; the legislature has wisely willed it, and the courts will favor rather than obstruct a reform so just and salutary in our criminal jurisprudence. *Isham vs. The State*, 112.  
See HUSBAND AND WIFE.

## TENANTS IN COMMON.

1. *Right of redemption. Possession.* When an equity of redemption descends to several as tenants in common, each one has a right to redeem, or to bring suit to enforce the equity on behalf of the others, without express authority. The act of one is the act of all in any legal proceeding necessary to secure the right and possession, and the law in such case implies an authority in each to act for the others. So, if one makes a tender, which is accepted, and the party put in possession, it would be the possession of all the tenants in common. *Gentry et al. vs. Gentry, et al.*, 87.
3. *As affected by statute of limitations. Adverse possession of co-tenant.* An actual ouster must be clearly established, in order to give effect to the statute of limitations in favor of one tenant in common against another; as nothing but an actual ouster, or what is held its equivalent, can give a tenant in common an exclusive possession. *Hubbard and Wood vs. Wood's lessee*, 279.
4. *Same.* The presumption is against an adverse possession between privies. Therefore, the possession of one tenant in common, being consistent with the right of the other, and in support of their common title, the statute of limitations must be strictly construed in favor of the co-tenant not in actual possession. *Ib.*
5. *Evidence of disseisin.* An exclusive adverse possession by one tenant in common of the whole tract of land, or the exclusive receipt of the rents and profits; no demand being made by the other tenant during the period prescribed in the statute of limitations, or, if such demand be made it is refused and the title denied, may be evidence of a disseisin, or actual ouster. *Ib.*

## TRESPASS.

1. *Right of action. Trustee.* Where real estate is settled by a decree of the chancery court, upon a trustee, for the use and benefit of a *feme covert*, who remains in possession of the premises, such possession of the *cestui que trust*, is the possession of the trustee. Upon his acceptance of the trust, the trustee instantly becomes vested not only with the right of possession, but in legal contemplation, with the actual possession also, and may maintain trespass against a wrong-doer

TRESPASS—*Continued.*

having no title, although the decree creating said trust, be technically imperfect, and does not vest him with the absolute legal title. *Rogers vs. White*, 68.

3. *Right of action. Possession.* A party in actual possession under grant, even though it be adverse to an older, valid and subsisting title, is to be regarded as in possession to the extent of the boundaries of his grant, and may maintain trespass against any wrong-doer having no title or authority to enter. *Roach vs. Boyd*, 135.

See LAND LAW.

TITLE.

2. *Modes of acquiring.* All the modes of acquiring title to real property, known to our law, are reducible to two—viz: *descent*, where the title is vested in the heir by operation of law; and, *purchase*, which, in contradistinction to descent, includes all other methods of acquiring title to land. *Hubbard and Wood vs. Wood's lessee*, 279.

TRUST.

3. *In exclusion of the marital right. Duration.* Where an estate is settled upon a trustee for the sole use and benefit of a *feme covert* free from the use, control or creditors of the husband, the interest of the trustee continues no longer than the purposes of the trust demand. The object being to protect the property against the marital rights of the husband, upon *his* death, all the purposes of the trust are accomplished. The wife's right becomes absolute in her as before marriage, and the interest of the trust is at an end. *Rogers vs. White*, 69.

TRUSTEE.

1. *Where one resigns and another appointed by the court without vesture of title.* *Act of 1831. ch. 107.* Where a trustee tenders his resignation to the chancery court, under the act of 1831, ch. 107, which is accepted, and another appointed in his stead, without a formal vestiture of title in the trust fund, upon the discharge of the first trustee, by implication of law the title is transferred to and becomes vested in his successor, appointed by the court. *Wooldrige et al. vs. The Planter's Bank et al.*, 297.

See LIMITATIONS. CHANCERY. REMAINDER. TRESPASS.

TURNPIKE COMPANY.

1. *Damages to land.* *Act of 1850, ch. 72, § 5.* Upon the return into the circuit court of the verdict of a jury appointed under the act of 1850, ch. 72, to assess the damages sustained by the owner of lands through which a turnpike road may be located, under said act either party have the right to except to such verdict and make good their exceptions by proof before the court. The court is the exclusive trier of such exceptions, and may allow them and order a new jury as before, or disallow them and adopt the verdict of the jury as the judgment of the court. The idea of a jury trial in court is expressly excluded by the act. *Clarksville & Hopkinsville Turnpike Co. vs. Atkinson*, 426.
2. *Same. How the jury are to proceed.* A jury appointed under the act of 1850, ch. 72, § 5, to assess damages against a turnpike company, as

TURNPIKE COMPANY—*Continued.*

directed in said act, are to determine the sum as damages to be paid, upon a view of the premises. They are to view the facts and determine the case upon the evidence of their own senses, and not upon the evidence of witnesses. *Ib.*

3. *Sams.* What shall be grounds of exception to report of jury. How matters of exception to be proven. It is good cause to set aside the verdict of a jury appointed under the act of 1850, ch. 72, § 5, to assess damages against a turnpike company: 1. That the proceedings are irregular. 2. That the verdict is founded upon an erroneous principle. 3. That the damages are excessive. Affidavits of an *ex parte* character in the circuit court, in proving or disproving such exceptions, are irregular and unauthorized. The evidence should be governed by the same rule as in other cases, giving the parties an opportunity to apply the test of cross examination. *Ib.*

## USURY.

See RES JUDICATA.

## WAIVER.

See CHANCERY.

## WARRANTY.

See SLAVE.

## WILL.

1. *Executory contract.* Sale of land by, previously devised. Where a testator by executory contract, sells land which he had previously devised by will; in the view of a court of equity, such sale operates as a revocation of the will *pro tanto*, provided the contract of sale be such as the court can, in view of well settled principles, specifically execute. *Donohoe vs. Lea*, 1 Swan R., cited and approved. *Blair & Gillenwater, adm'rs, vs. Snodgrass & Lyons et als.*, 1.
5. *Residuary clause.* Construction. When the testator had already made provision for the children of his son, J. S., dec'd., and by the residuary clause of the will bequeathed the fund equally to all his *heirs*, "except that G.'s children" (who were the children of his daughter who had been twice married,) were to have an equal part or one share with his other *heirs*: *Held*, that by the word *heirs*, the testator meant his children, and that the heirs of J. S. were excluded. *Ib.*, 2.
1. *Where it declares a power to sell land without naming donee of the power.* *Executor.* If a will direct an estate to be sold, not naming a donee of the power, such power devolves by implication upon the executor, provided he is charged with a distribution of the fund. So, where a testator appoints his executor, and directs the sale of his real estate, and a division of the fund among his legatees, but does not say by whom the land is to be sold or the fund to be distributed, it being the duty of the executor to pay legacies, he has power under such will, to raise the fund by a sale and conveyance of the land. *Lockart vs. Northington*, 818.
1. *Construction.* *Supplying words.* In the construction of a will all its parts are to be construed with reference to each other. The entire

WILL—Continued.

Instrument, and not disjointed parts of it, are to be considered in ascertaining the intention of the testator, and words may be supplied in order to effectuate his intention when it is obvious from the context. *Simpson et al. vs. Smith et al.*, 394.

2. *Application of the principle that words may be supplied in a will.* There must be connexion by grammatical construction, direct words of reference, or by the declaration of some common purpose between distinct bequests in a will, to justify the drawing in aid the special terms of one bequest to construe another. And this is so, although there may be no apparent reason except the different wording of the clauses, to presume that the testator had a different purpose in view. *Id.*
1. *Capacity of infants to make will of personalty.* An infant may make a testament of chattels, if a male, at the age of fourteen; and if a female, at the age of twelve years. *Davis vs. Baugh, ex'r.*, 477.
2. *Same. Origin of the rule.* The rule as to the capacity of infants to dispose of personal property by will is derived originally from the civil law, and was adopted by the English ecclesiastical courts having jurisdiction of the subject of wills and intestates' estates. Their rules of decision upon these subjects have been received and admitted by immemorial usage as a part of the common law of England, which system has been adopted by us so far as it is consistent with the nature and genius of our institutions. *Id.*
1. *Construction. Remainder. Power of appointment in tenant for life.* Where a testator devised to his son the tract of land upon which said son then lived, during his life, or so long as said son shall continue to reside on the same, at his death or removal to go to the children of such son, or their representatives, in fee, with a discretionary power of disposition to said son, at any time before his death or removal therefrom, by deed or will to convey said land to any one or more of his said children, so as to vest the entire estate in said child or children, provided that if said son should fail to exercise said power of disposition, that said children should take equally at the termination of the particular estate, with a provision that the wife of said son, (should she survive him,) should have a life estate in said land; such a remainder is vested in all the children, subject to the special devise to the wife, and could only be defeated by the *bona fide* exercise of the power of appointment. It took effect at the death of the son, or his removal from the land, provided he had not legally exercised said power of appointment. Upon this contingency alone the remainder depended, and if it did not happen, the children, whether born before or after the death of the testator, are the unquestionable owners of the estate. *Bostick et al. vs. Winton et al.*, 524.
1. *Construction. Executory devise.* It is a rule of the common law, well established, that a limitation of an estate upon the contingency of the first taker dying without issue or heirs, is bad, as being too remote; because those words have a technical meaning, and *per se* are taken to indicate an indefinite failure of issue. If these words, therefore, stand alone in a will, they must be construed in their technical

## WILL—Continued.

sense; but the meaning of the testator, with this exception, being a question of intention, the fixed artificial sense of the words referred to will be controlled by any clause or circumstance in the will which goes to show that he meant by the use of them a definite failure of issue, or a failure of issue at his death, or within a life or lives in being and twenty-one years, and a fraction thereafter. Vide acts of 1852, ch. 91. *Bramlet et al. vs. Bates, et al.*, 554.

2. *Same. Same.* Where a testator dying in 1849, gave his estate to his two sons, J. and T., in equal proportions to them and their heirs forever, creating a limitation in these words: "If the said J. should die before my son, T., and without issue, then the property to go to T. and his heirs forever;" such a limitation to T. is a good and valid executory devise, and upon the happening of the contingency contemplated, vests the estate in him. *Ib.*
1. *Construction. Conflicting intentions.* Where the terms of a will evince a conflict of intention, the one primary and the other secondary, it is a well settled rule that the primary intention must always prevail over the secondary. Watt, by his last will and testament, probated in January, 1853, bequeathed freedom to his slaves in these words: "I direct that all my slaves be set free and sent to a free State, at my expense, as soon as possible." Held, that the freedom of the slaves was the primary object of the testator, which could not be defeated by the mere fact that the sending the slaves to a "free State" of this Union, (the evident meaning of the testator,) is inconsistent with the laws or comity of Tennessee; that under the act of 1853-4, C. L., which embraces all slaves who have heretofore acquired a right to freedom, but who have not been emancipated by the county court, they are required to be sent to Liberia; but that the fund for such purpose cannot be a charge upon the estate, but must be raised by hiring the slaves under the provision of said act, or from some other source. *Boon vs. Lancaster, next friend, &c.*, 577.
1. *Nuncupation.* To make a nuncupative will valid, it must be made in substantial conformity to the requirements of law, and it must clearly appear that the deceased understood herself at the time to be making a will. So, where the deceased a few days before her death, stated in the presence of witnesses how she wished her property divided, but did not call upon any one to bear it in mind as her will, and a few hours before had been heard to say that she wished "to fix up her affairs, but it was too late, as every thing had to be recorded," such a disposition of her property is not a valid nuncupation. *Ridley, guardian, &c., vs. Coleman et. al.*, 616.

See EMANCIPATION.

## WIDOW.

See ESCHENTS.

## WITNESS.

See EVIDENCE. PARTNERSHIP. SLANDER.

## WRIT.

See ACTION.

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